Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

DONALD AND PATSY ISRAEL,
RICHARD AND SHIRLEY QUINTON,
ALL D/B/A ISRAEL AND QUINTON FARMS,
Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE
AND FARM SERVICE AGENCY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Farm Service Agency ("FSA") makes farm operating loans, farm ownership loans, and emergency loans in order to assist farmer-borrowers in financial distress. The Agricultural Act of 1987 allows farmers who are in default to apply for various loan servicing and debt restructuring options. One of the benefits offered through the program is the writing down of principal and accumulated interest charges of Farm Service Agency loans. Borrowers who qualify for a write-down on a loan secured by real estate may be required to enter into a shared appreciation agreement.

Petitioners Donald and Patsy Israel and Richard and Shirley Quinton, all d/b/a Israel and Quinton Farms ("Petitioners") entered into a shared appreciation agreement ("Agreement") with FSA on September 15, 1989. At the time of the execution of the Agreement, an FSA loan officer explained to Petitioners that no recapture would be made unless Petitioners paid the loan in full, ceased farming operations, or transferred title of the security during the ten year write-down period. Nevertheless, at the conclusion of the ten year write-down period, FSA contacted Petitioners, demanding a payment of $96,500.00 in shared appreciation. Despite Petitioners' vigorous protestations, FSA refused to reconsider its determination and, on September 9, 1999, FSA affirmed its decision requiring Petitioners to pay $96,500.00 in shared appreciation.

Two questions are presented herein: (a) whether FSA's determination that Petitioners are responsible for $96,500.00 in "shared appreciation" is arbitrary, capricious, contrary to law, and unsupported by substantial evidence and (b) whether FSA is estopped from collecting $96,500.00 from Petitioners for the appreciated value of their property between 1989 and 1999.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

On September 9, 1999, FSA affirmed its decision requiring Petitioners to repay $96,500.00 in shared appreciation. On October 7, 1999, Petitioners filed a joint appeal before the National Appeals Division of the Department of Agriculture. On January 3, 2000, Hearing Officer Benner ruled that FSA's decision to demand $96,500.00 in shared appreciation from Petitioners was not erroneous. The decision of the National Appeals Division of the Department of Agriculture (Pet. App. 95a-101a) is not otherwise published. On February 4, 2000, Petitioners requested a Director Review of FSA's determinations. On or about March 17, 2000, a Final Director Review Determination was entered affirming FSA's determinations. The Final Director Review Determination (Pet. App. 90a-94a) is not otherwise published.

Petitioners commenced this action on April 17, 2000. On March 2, 2001, the United States District Court for the Western District of Wisconsin (per Crabb, D.J.) affirmed FSA's decisions. The opinion of the United States District Court for the Western District of Wisconsin (Pet. App. 54a-73a) is published at 135 F.Supp.2d 945 (W.D. Wis. 2001). On April 17, 2001, Petitioners filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit. On March 8, 2002, the United States Court of Appeals for the Seventh Circuit entered its opinion and order (per Kanne, C.J.) affirming the decisions of FSA and the United States

District Court for the Western District of Wisconsin. The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a-15a) is published at 282 F.3d 521 (7th Cir. 2002).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its opinion and order on March 8, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Federal Administrative Procedure Act ("APA"), 5 U.S.C. §§ 556 and 701, relevant to this petition are reprinted in the Appendix at 114a-117a.

STATEMENT OF THE CASE

During the late 1980s, in the midst of the national farm crisis, the Farmers Home Administration ("FHA"), now known as FSA, negotiated with numerous farmers for write-downs of their existing debts; these write-downs were authorized by the Agricultural Act of 1987. In 1988, Petitioners entered into negotiations with FHA/FSA for a write-down of their debt, which consisted of six notes, having an aggregate principal amount of approximately $200,000.00. Pet. App. 78a. The negotiations between FHA and Petitioners culminated in the execution of a Shared Appreciation Agreement (the "Agreement") dated September 15, 1989. Pet. App. 78a.

When the Agreement was signed, Mike Drewiske ("Drewiske"), FHA/FSA's Farm Loan officer in Spooner,

Wisconsin, explained to Petitioners that no recapture would be made unless Petitioners paid their loan in full, ceased farming operations, or transferred title to the security during the ten year write-down period. Pet. App. 80a. At the time of the execution of the Agreement, it was Petitioners' understanding that no recapture would be made if the Agreement expired after ten years and Petitioners had not paid the loan in full, ceased farming operations, or transferred title to the security. Pet. App. 80a. This understanding was corroborated by subsequent discussions with and correspondence from Karilyn Corbett ("Corbett"), another FHA/FSA loan officer, who told Petitioners that the Agreement was to be so interpreted and understood. Pet. App. 110a-111a.

Nevertheless, at the conclusion of the ten year write-down period, FSA contacted Petitioners, demanding a payment of $96,500.00 in shared appreciation. Despite Petitioners' vigorous protestations, FSA refused to reconsider its determination and, on September 9, 1999, FSA affirmed its decision requiring Petitioners to pay $96,500.00 in shared appreciation. Pet. App. 84a.

1. On October 7, 1999, Petitioners filed a joint appeal before the National Appeals Division of the Department of Agriculture. Pet. App. 84a. Pursuant to Petitioners' appeal, a scheduling conference was held in Eau Claire, Wisconsin, before FSA Hearing Officer David Benner ("Hearing Officer Benner"), on November 18, 1999. Pet. App. 84a. At the scheduling conference, Petitioners requested to have Drewiske and Corbett subpoenaed to attend the evidentiary hearing. Pet. App. 84a. Drewiske was the officer who originally negotiated the Agreement, and made statements to Petitioners regarding the interpretation of the Agreement; Corbett is an FSA official with particular

knowledge as to the interpretation of the Agreement, and who also made statements to Petitioners regarding their particular contract. Pet. App. 84a.

On December 2, 1999, Petitioners requested that Russell Kiecker ("Kiecker") also be subpoenaed to attend and testify at the hearing. Pet. App. 84a. Kiecker, who served as Petitioners' County Agent during the relevant period, was to present testimony concerning land values in the area and to submit an opinion regarding FSA's appraisal of the value of Petitioners' property for purposes of calculating the amount of the recapture. On December 8, 1999, Hearing Officer Benner denied all three of Petitioners' subpoena requests. *See* Pet. App. 102a-105a.

Pursuant to 7 U.S.C. § 6997(c), a hearing before Hearing Officer Benner was held on December 9, 1999. Neither Drewiske, Corbett, nor Kiecker were produced to testify at the hearing. Hearing Officer Benner therefore had only a partial record upon which to base his determination. On January 3, 2000, Hearing Officer Benner ruled that FSA's decision to demand $96,500.00 in Shared Appreciation from Petitioners was not erroneous. Pet. App. 95a-101a. On February 4, 2000, Petitioners requested a Director Review of FSA's determinations. On March 17, 2000, a Final Director Review Determination was entered affirming Hearing Officer Benner's determinations. Pet. App. 90a-94a. On April 17, 2000, Petitioners filed an action in the United States District Court for the Western District of Wisconsin seeking judicial review of FSA's determination that they were responsible for the alleged Shared Appreciation and asserting that FSA was estopped from collecting any alleged Shared Appreciation from Petitioners. Pet. App. 76a-89a.

2. The United States District Court for the Western District of Wisconsin held (a) that the Director of the National Appeals Division for the Department of Agriculture (the "Director") "did not err in concluding that appreciation is recoverable" at the expiration of the Agreement and (b) that FSA "cannot be estopped from collecting $96,500.00 from [Petitioners] for the appreciated value of their property between 1989 and 1999." Pet. App. 54a-73a.

Specifically, the District Court held that "[a]fter reviewing the administrative record, including the transcript of the evidentiary hearing" it could not find that the Director's determination that appreciation is recoverable at the expiration of the Agreement was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or unsupported by substantial evidence." Pet. App. 69a-70a (internal quotation marks and citation omitted). The District Court's conclusion was founded primarily upon its findings (a) that the Director's determination that "the language of the shared appreciation agreement was clear," Pet. App. 66a, and (b) that the Agreement "conveyed the basic concept that borrowers had to give up a share of the appreciation of the loan collateral in return for the debt write-down and that this share would become due when the agreement expired or earlier if the agreement was terminated upon the happening of a specified event." Pet. App. 67a. Based upon these findings, the District Court stated it could not hold that the Director's determination that appreciation is recoverable at the expiration of the Agreement "was not rational or that the director failed to consider the language of the agreement and the parties' arguments as to its meaning in reaching his conclusion." Pet. App. 69a-70a.

As to Petitioners' estoppel claim, the District Court ruled that FSA could not be estopped from recapturing an

appropriate percentage of the appreciation at the expiration of the Agreement. Pet. App. 70a-73a. Fundamental to the District Court's analysis were its findings that (a) FSA was not acting in a proprietary capacity in its dealings with Petitioners, Pet. App. 71a, (b) FSA's loan officers lacked the authority to bind Respondent to a certain position by misstating the terms of the shared appreciation agreement, Pet. App. 71a, and (c) that Petitioners "failed to demonstrate any affirmative misconduct on behalf of the government in misleading them as to the terms of the recapture provision." Pet. App. 72a.

The District Court first explained that "[t]he government acts in a proprietary capacity when it undertakes activities primarily for the commercial benefits of the government" (internal quotation marks omitted) and that "[i]t cannot be said that the FSA acts in a proprietary capacity in lending money to farmers in financial distress." Pet. App. 70a-71a. The District Court then noted that "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority," Pet. App. 71a (internal quotation marks omitted), and that the "Farm Service Agency loan officials did not have the authority to bind [FSA] to a certain position by misstating the terms of the shared appreciation agreement." Pet. App. 71a. Finally, the District Court ruled that Petitioners may assert their equitable estoppel claim only "when the traditional elements of estoppel are shown and there is affirmative misconduct on the part of the government" and there is "more than mere negligence." Pet. App. 72a. In concluding its analysis of Petitioners' estoppel claim, the District Court stated that the alleged misstatements of FSA's loan officers were "correct but incomplete statement[s] of the terms of the agreement" and found that Petitioners "failed to demonstrate

any affirmative misconduct on behalf of the government in misleading them as to the terms of the recapture provision." Pet. App. 72a.

3. On Petitioners' appeal, the United States Court of Appeals for the Seventh Circuit affirmed, holding that FSA did not err in concluding that recapture is provided for at the expiration of the Agreement. Pet. App. 1a-15a. The Seventh Circuit held that the "plain language of the Agreement provides for recapture at the expiration date of the Agreement" and that FSA's determinations were "strongly supported" by the language of 7 U.S.C. § 2001(e). Pet. App. 14a. The Seventh Circuit also based its decision upon *In re Moncur*, No. 98-03213, 1999 WL .33287727 at * 4 (Bankr. D. Idaho May 27, 1999) (holding that FSA's loan program "contemplated a recapture payment at the conclusion of the [agreement] term if payment in full of the write-down balance had not been made during the term of the [agreement]"). Pet. App. 15a.

Despite the Seventh Circuit's statement at footnote 3 of its opinion that Petitioners "concede[d] that their estoppel argument is without merit," *see* Pet. App. 15a, Petitioners' appellate brief presented a detailed written argument vigorously asserting their estoppel claim. Pet. App. 43a-47a. Specifically, Petitioners' Appellate Brief argued that FSA is estopped from collecting any alleged Shared Appreciation from Petitioners pursuant to the holding in *Portmann v. United States*, 674 F.2d 1155 (7th Cir. 1982). *See* Pet. App. 44a-45a. Moreover, Petitioners' counsel did not concede that Petitioners' estoppel argument was without merit at oral argument.

The Seventh Circuit's decision in this case (a) approves of and, therefore, implicitly participates in the

arbitrary and capricious decisions of FSA in refusing to allow Drewiske, Corbett, or Kiecker to present evidence at the hearing of December 9, 1999, and in rendering determinations based upon only a partial record thereby depriving Petitioners of their right to a fair and unbiased hearing of their claims against FSA; (b) virtually impresses our national judicial system's "seal of approval" on determinations of FSA which are patently contrary to law and unsupported by substantial evidence; (c) modifies an existing rule of law in that it deprives Petitioners, and a significant cross-section of America's family farmers, of an adequate opportunity to seek redress for their claims against a governmental agency as well as due process of law; (d) involves an issue of continuing public interest in that it subjects Petitioners, and a significant cross-section of America's family farmers, to FSA's arbitrary and capricious decision-making processes relating to its enforcement of Shared Appreciation Agreements entered into pursuant to the provisions of the Agricultural Act of 1987; and (e) completely ignored Petitioners' estoppel claim against FSA and deprived Petitioners of due process of law.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

This petition should be granted for four reasons. First, the decision below merits this Court's immediate intervention because it approves of and implicitly participates in the arbitrary and capricious decisions of FSA in (a) refusing to allow Drewiske, Corbett, or Kiecker (collectively referred to herein as "Petitioners' Witnesses") to present evidence at the hearing of December 9, 1999, (b) rendering a decision based upon only a partial record, and (c) interfering with Petitioners' right to a fair and unbiased hearing of their claims

against FSA and due process of law. Second, certiorari is warranted because FSA's determinations were contrary to law and unsupported by substantial evidence.

Third, the decision below merits this Court's immediate intervention because (a) it modifies an existing rule of law in that it deprives Petitioners, and a significant cross-section of America's family farmers, of both an adequate opportunity to seek redress for their claims against a governmental agency and due process of law and (b) it involves an issue of continuing public interest because it subjects Petitioners, and a significant cross-section of America's family farmers, to FSA's arbitrary and capricious decision-making processes relating to its enforcement of Shared Appreciation Agreements entered into pursuant to the provisions of the Agricultural Act of 1987.

Fourth, certiorari is warranted because the decision below completely ignored Petitioners' estoppel claim against Respondent, depriving Petitioners of due process of law. Despite the Seventh Circuit's statement at footnote 3 of its opinion that Petitioners "concede[d] that their estoppel argument is without merit," *see* Pet. App. 15a, Petitioners' appellate brief presented a detailed written argument vigorously asserting their estoppel claim. Specifically, Petitioners' appellate brief argued that FSA is estopped from collecting any alleged Shared Appreciation from Petitioners pursuant to the holding in *Portmann v. United States*, 674 F.2d 1155 (7th Cir. 1982).[1] Pet. App. 43a-47a.

[1] Although Petitioners' appellate brief acknowledged that the Seventh Circuit may not be the proper forum to hear a classic estoppel claim, Petitioners presented their estoppel argument therein in conjunction with and in support of their argument that FSA's actions were arbitrary, capricious, and contrary to law. In this case, FSA, acting essentially as a bank, entered into the Agreement

I. Certiorari is Warranted because the Decision Below Approves of and Implicitly Participates in the Arbitrary and Capricious Decisions of FSA.

In refusing to allow Petitioners' Witnesses to testify at the hearing of December 9, 1999, and in rendering determinations based upon only a partial record, Hearing Officer Benner and FSA conducted themselves in an arbitrary and capricious manner which inevitably deprived Petitioners of their right to a fair and unbiased hearing of their claims against FSA and due process of law. Throughout the proceedings below, FSA was permitted to introduce parol evidence in support of its interpretation of the Agreement. Specifically, FSA relied upon 7 U.S.C. § 2001 and 7 C.F.R. §§ 1951.914(b) and 1922.201 in support of its argument that FSA's decision to demand $96,500.00 in shared appreciation was not erroneous. Petitioners' requests to introduce parol evidence (*i.e.*, the testimony of Petitioners' Witnesses) in support of their own interpretation of the Agreement were arbitrarily and capriciously rejected by FSA and brushed aside by the District Court and the Seventh Circuit.

That FSA was permitted to introduce parol evidence in support of its interpretation of the Agreement while Petitioners' requests to introduce similar evidence in support of their own interpretation of the Agreement were refused both highlights the arbitrary and capricious nature of the proceedings below and substantiates Petitioners' claim that they were deprived of their right to a fair and unbiased hearing of their claims against FSA as well as due process of

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with Petitioners and its agents made certain representations to Petitioners regarding the manner in which the Agreement would be interpreted. Petitioners relied upon these representations to their obvious detriment and have been deprived of an adequate opportunity to seek redress.

law. Section 706(A) of the APA requires a finding that the "actual choice made was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." That the proceedings below and FSA's subsequent determination that that it was entitled to collect $96,500.00 in shared appreciation were arbitrary and capricious is obvious when FSA's actions are examined in light of the plethora of cases construing the arbitrary and capricious standard:

Although the "arbitrary and capricious standard is highly deferential," an agency's actions will be upheld only if "the agency considered all relevant factors and the [reviewing] court can discern a rational basis for the agency's choice." *See Camp v. Pitts,* 411 U.S. 138, 143 (1973); *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415-16 (1971), *overruled on other grounds in Califano v. Sanders,* 430 U.S. 99 (1977). An "agency's decision is not arbitrary or capricious as long as the agency's path may be reasonably discerned." *Mount Sinai Hospital Medical Center v. Shalala,* 196 F.3d 703, 708 (7th Cir. 1999) (internal quotation marks omitted). Because FSA refused to hear testimony from Petitioners' Witnesses relating to Petitioners' interpretation of the Agreement, the record FSA's determinations were founded upon was incomplete. As such, FSA did not consider "all relevant factors" and the "path" FSA followed in determining that it was entitled to collect $96,500.00 in shared appreciation cannot be "reasonably discerned."

The decision below approves of, and implicitly participates in, the arbitrary and capricious decisions of FSA together with the corresponding and resultant interference with Petitioners' right to a fair and unbiased hearing of their claims against FSA and due process of law. As such, the decision below merits this Court's immediate intervention.

II. Certiorari is Warranted because FSA's Determinations were Contrary to Law and Unsupported by Substantial Evidence.

The substantial evidence test applies when agency action occurs in connection with a public adjudicatory hearing, *see* 5 U.S.C. §§ 556 and 557, which was precisely the type of hearing held in this case. In *Morgan v. United States*, 298 U.S. 468, 480 (1936) (*Morgan I*), this Court explained that such a public adjudicatory hearing "has a quality resembling that of a judicial proceeding" and that such proceedings are frequently described as possessing "a quasi-judicial character." Continuing, the *Morgan I* Court held that a public adjudicatory hearing under 5 U.S.C. §§ 556 and 557 "is the hearing of evidence and argument" and that if the hearing officer "who determined the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." 298 U.S. at 480-81.

In *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951), this Court stated in no uncertain terms that "substantial evidence" under the APA requires a thorough review of the entire record. According to the *Universal Camera* Court's analysis, the Administrative Procedure Act definitively bars the practice of ignoring "contradictory evidence or evidence from which conflicting inferences could be drawn * * *." 340 U.S. at 487. Continuing, the *Universal Camera* Court held that "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in [the APA] that the court consider the whole record." 340 U.S. at 488. The APA's own legislative history, which reinforces *Universal Camera* Court's analysis, indicates that the APA's "requirement of review upon the whole record" means that an agency fact-

finder "may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case." Sen. Doc. No. 248, 79th Cong., 2d Sess. 214, 280 (1946).

In addition, in *Morgan v. U.S.*, 304 U.S. 1, 18 (1938) (*Morgan II*), this Court concluded that the "right to a hearing" embraces "the right to present evidence" as well as the right to contest the claims of the opposing party. According to the holding in *Morgan II*, the "right to submit argument implies [an opportunity to present evidence]; otherwise the right may be but a barren one." 304 U.S. at 18. Continuing, the *Morgan II* Court held that citizens "who are brought into contest with the Government in a quasijudicial proceeding" are entitled "to be heard" before the government issues its final decision. In this case, Petitioners' right to present evidence was effectively sterilized by FSA's decision to exclude the testimony of Petitioners' Witnesses. Consequently, FSA's determination that it was entitled to collect $96,500.00 from Petitioners was not based upon a review of "the whole record" and Petitioners were effectively deprived of their right to be heard.

Pursuant to the holdings in *Morgan I, Morgan II,* and *Universal Camera*, the APA's own legislative history, FSA was required to consider "the whole record" before ruling on Petitioners' claims. In denying Petitioners' requests to introduce the testimony of Petitioners' Witnesses in support of their interpretation of the Agreement, FSA ignored evidence Petitioners sought to introduce into the record in accordance with 5 U.S.C. §§ 556 and 557. Because this evidence, "from which conflicting inferences could be drawn," 340 U.S. at 487, was summarily excluded from the record – a practice both prohibited by this Court in *Universal Camera* and denounced in the APA's legislative history –

FSA failed to consider "the whole record" before ruling on Petitioners' claims. FSA's decision to exclude the testimony of Petitioners' Witnesses ensured that the record contained only evidence supporting its interpretation of the Agreement in violation of both the letter and the spirit of the APA: According to the APA's own legislative history, an agency fact-finder "may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case." Sen. Doc. No. 248, 79th Cong., 2d Sess. 214, 280 (1946).

According to the *Morgan I* Court, the weight ascribed by the law to FSA's determinations herein "rests upon the assumption that the officer who makes the findings has addressed himself to the evidence, and upon that evidence has conscientiously reached the conclusions which he deems it to justify." 298 U.S. at 481. Continuing, the *Morgan I* Court noted that the duty of an agency's fact-finder to render a determination based upon a review of the whole record "cannot be performed by one who has not considered evidence or argument * * * The one who decides must hear." 298 U.S. at 481. Although Petitioners have attempted to pursue their claims against FSA in compliance with the APA, FSA has essentially ignored the APA in excluding the testimony of Petitioners' Witnesses. In failing to consider "the whole record" before ruling on Petitioners' claim, FSA violated the letter and the spirit of the APA, at the same time producing a one-sided, self-serving record upon which the decisions of the lower courts were founded. Because FSA failed to consider "the whole record" before ruling on Petitioners' claim, and because both the District Court and the Seventh Circuit's heavily relied upon the record of the administrative proceedings below, Petitioners have never been afforded a fair, unbiased, and complete adjudicatory hearing of their claims against FSA. As such, Petitioners have been

denied due process of law and FSA's determination that it was entitled to collect $96,500.00 from Petitioners was contrary to law and unsupported by substantial evidence. Accordingly, this Court's immediate intervention is required.

III. Certiorari is Warranted because the Decision Below Modifies an Existing Rule of Law and Involves an Issue of Continuing Public Interest.

(A) The Decision Below Modifies an Existing Rule of Law in that it Deprives Petitioners, and a Significant Cross-Section of America's Family Farmers, of both an Adequate Opportunity to Seek Redress for their Claims Against a Governmental Agency and Due Process of Law.

Because Petitioners' requests to introduce the testimony of Petitioners' Witnesses in support of their interpretation of the Agreement were arbitrarily and capriciously rejected by FSA, the record upon which FSA based its determination that it was entitled to collect $96,500.00 from Petitioners contains only evidence supporting FSA's interpretation of the Agreement. In refusing to allow Petitioners' Witnesses to testify at the hearing of December 9, 1999, FSA "stacked the deck" in its own favor by depriving Petitioners of a fair and unbiased hearing and due process of law.

According to the holding in *Morgan I*, because the hearing officer "who determined the facts which underlie [FSA's determination that it was entitled to collect $96,500.00 from Petitioners] has not considered evidence or argument, it is manifest that the hearing has not been given." 298 U.S. at 480-81. Based upon this analysis, if the decision below is

allowed to stand, Petitioners will have been deprived of their right to seek redress for their claims against a governmental agency – a more perfect example of a violation of due process of law could not be fabricated by the most creative law professor. Moreover, if the decision below is allowed to stand, a significant cross-section of America's family farmers will be subjected to the same potential for abuse of the administrative process. In fact, the issues presently before this Court have been addressed by or are being addressed in federal courts across the country. *See, e.g., Stahl v. U.S. Department of Agriculture*, A3-01-85 (D. ND. May 24, 2002); *Bukaske v. U.S. Dept. of Agriculture*, 193 F.Supp.2d 1162 (D. S.D. March 27, 2002); *Viers v. Glickman*, 2000 WL 33363197 (S.D. Iowa Nov. 28, 2000); *Curtis v. Farm Service Agency*, 2001 WL 822413 (W.D. Mich. June 22, 2001); *Wright v. Farm Service Agency*, 2001 WL 822417 (W.D. Mich. June 22, 2001); *Pandora Farms v. USDA*, Civil No. 00-1753-A (E.D. Va. July 5, 2001); *In re Moncur*, No. 98-03213, 1999 WL 33287727 (Bankr. D. Idaho May 27, 1999); and *In re Tunnisen*, 216 BR 834 (Bankr. D. S.D. 1996).

That Petitioners were not afforded an adequate opportunity to challenge FSA's interpretation of the Agreement is problematic – justice and equity cannot prevail when one party is denied a fair, unbiased, and complete adjudicatory hearing. Even more troublesome, however, is FSA's reliance upon *Kafkaesque* techniques in enforcing its policies and agreements without consistency, explanation, or responsibility. If the decision below is allowed to stand, a significant cross-section of America's family farmers will be subjected to an unprecedented potential for abuse of the administrative process. Because the Seventh Circuit affirmed FSA's decision to exclude the testimony of Petitioners' Witnesses, the decision below modified an existing rule of

law governing the administrative process and denied Petitioners a fair and unbiased hearing and due process of law. As such, this Court's immediate intervention is required.

(B) The Decision Below Subjects Petitioners, and a Significant Cross-Section of America's Family Farmers, to FSA's Arbitrary and Capricious Decision-Making Processes Relating to its Enforcement of Shared Appreciation Agreements.

The weight ascribed by the law to FSA's determinations herein "rests upon the assumption that the officer who makes the findings has addressed himself to the evidence, and upon that evidence has conscientiously reached the conclusions which he deems it to justify." *Morgan I*, 298 U.S. at 481. As such, the duty of an agency's fact-finder to render a determination based upon a review of the whole record "cannot be performed by one who has not considered evidence or argument * * * The one who decides must hear." 298 U.S. at 481. Because FSA refused to "hear" testimony from Petitioners' Witnesses, the record FSA's determinations were founded upon was incomplete. As such, FSA did not consider "all relevant factors," *see Camp,* 411 U.S. at 143 and *Overton Park,* 401 U.S. at 415-16, and the "path" FSA followed in determining that it was entitled to collect $96,500.00 in shared appreciation cannot be "reasonably discerned." *See Mount Sinai,* 196 F.3d at 708. Consequently, FSA's determination that it was entitled to collect $96,500.00 from Petitioners was arbitrary and capricious. In affirming the District Court's decision below, the Seventh Circuit approved of and reinforced the arbitrary and capricious decisions of FSA and exasperated the corresponding and resultant interference with Petitioners'

right to a fair and unbiased hearing of their claims against FSA and due process of law.

Furthermore, if the decision below is allowed to stand, a significant cross-section of America's family farmers will potentially be subjected to FSA's arbitrary and capricious decision-making processes relating to its enforcement of Shared Appreciation Agreements entered into pursuant to the Agricultural Act of 1987. As indicated at Section III(A) herein, the issues before this Court have been addressed by or are being addressed in federal courts across the country, highlighting the national importance of this litigation.[2] In many of these cases, America's family farmers have been arbitrarily and capriciously denied the opportunity to present evidence in support of their own interpretations of their Shared Appreciation Agreements. Based upon the Seventh Circuit's approval of the arbitrary and capricious decisions of FSA herein, and the significance of this litigation to America's family farmers in general, the decision below merits this Court's immediate intervention.

[2] *See, e.g., Stahl v. U.S. Department of Agriculture*, A3-01-85 (D. ND. May 24, 2002); *Bukaske v. U.S. Dept. of Agriculture*, 193 F.Supp.2d 1162 (D. S.D. March 27, 2002); *Viers v. Glickman*, 2000 WL 33363197 (S.D. Iowa Nov. 28, 2000); *Curtis v. Farm Service Agency*, 2001 WL 822413 (W.D. Mich. June 22, 2001); *Wright v. Farm Service Agency*, 2001 WL 822417 (W.D. Mich. June 22, 2001); *Pandora Farms v. USDA*, Civil No. 00-1753-A (E.D. Va. July 5, 2001); *In re Moncur*, No. 98-03213, 1999 WL 33287727 (Bankr. D. Idaho May 27, 1999); and *In re Tunnisen*, 216 BR 834 (Bankr. D. S.D. 1996).

IV. Certiorari is Warranted because the Decision Below Completely Ignored Petitioners' Estoppel Claim Against FSA and Deprived Petitioners of Due Process of Law.

Despite the Seventh Circuit's statement that Petitioners "concede[d] that their estoppel argument is without merit," Petitioners' Appellate Brief (*see* Pet. App. 15a, n. 3) presented a detailed written argument vigorously asserting their estoppel claim.[3] Specifically, Petitioners' appellate brief argued that FSA is estopped from collecting any alleged Shared Appreciation from Petitioners pursuant to the holding in *Portmann v. United States*, 674 F.2d 1155 (7th Cir. 1982).[4] Because the Seventh Circuit's decision completely ignored Petitioners' estoppel claim against Respondent, Petitioners were deprived due process of law; as such, the decision below merits this Court's immediate intervention.

In *Portmann*, the Seventh Circuit recognized the distinction between "proprietary" governmental activities and "sovereign" governmental activities. 674 F.2d at 1160. Under this approach, the government is immune from an

[3] *See* 282 F.3d 521, 528 n. 3 (7th Cir. 2002).

[4] Although Petitioners' appellate brief acknowledged that the Seventh Circuit may not be the proper forum to hear a classic estoppel claim, Petitioners presented their estoppel argument therein in conjunction with and in support of their argument that FSA's actions were arbitrary, capricious, and contrary to law. In this case, FSA, acting essentially as a bank, entered into the Agreement with Petitioners and its agents made certain representations to Petitioners regarding the manner in which the Agreement would be interpreted. Petitioners relied upon these representations to their obvious detriment and have been deprived of an adequate opportunity to seek redress.

estoppel claim only when it is engaged in "sovereign" governmental activities. 674 F.2d at 1160. According to the *Portmann* court, activities undertaken for the commercial benefit of the government or an individual government agency are subject to estoppel. 674 F.2d at 1160. Specifically, the *Portmann* court held that the proprietary or commercial character of the transaction "militates in favor of allowing an estoppel claim," and that a claim of estoppel should be allowed where the government has entered into written agreements which support such a claim. 674 F.2d at 1161-62.

The District Court's decision states: "The government acts in a proprietary capacity when it undertakes activities primarily for the commercial benefits of the government." *Israel v. U.S. Department of Agriculture*, 135 F.Supp.2d 945, 952 (W.D. Wis. 2001) (citations and internal quotation marks omitted). Despite the District Court's reliance upon this proposition and Petitioners' reliance upon the holding in *Portmann*, the District Court failed to provide any meaningful analysis of Petitioners' estoppel claim. In light of the full text of 7 U.S.C. § 2001, the provisions of which govern FSA's debt restructuring and loan servicing activities, and the holding in *Portmann,* it is clear that FSA's actions *vis a vis* Petitioners should be classified as "proprietary" governmental activities.

According to 7 U.S.C. § 2001(a)(1), FSA's debt restructuring and loan servicing activities are to be administered "to the maximum extent possible – to avoid losses to the Secretary [of Agriculture] on such loans, with priority consideration being placed on writing-down the loan principal and interest * * * whenever these procedures would facilitate keeping the borrower on the farm or ranch * * *." Based upon the plain meaning of 7 U.S.C. § 2001(a)(1), it is

overwhelmingly clear that one of the primary purposes of FSA's debt restructuring and loan servicing activities is to secure "commercial benefits" for the government. According to the holding in *Portmann*, activities undertaken for the commercial benefit of the government or an individual government agency are subject to estoppel. 674 F.2d at 1160. As such, the District Court's determination that "[i]t cannot be said that [FSA] acts in a proprietary capacity in lending money to farmers in financial distress" and the Seventh Circuit's affirmation of the District Court's decision are clearly erroneous and must be reversed. As such, the decision below merits this Court's immediate intervention.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-1910

[Filed March 8, 2002]

Donald and Patsy Israel, Richard and Shirley Quinton, all d/b/a Israel and Quinton Farms,	)
Plaintiffs-Appellants,	)
v.	)
United States Department of Agriculture, Farm Service Agency,	)
Defendant-Appellee.	)

Appeal from the United States District
Court for the Western District of Wisconsin
No. 00 C 223
Barbara B. Crabb, Chief Judge

JUDGES:
Before Harrington Wood, Jr., Cudahy, and Kanne, Circuit Judges.

OPINION

Kanne, *Circuit Judge*. In 1989, plaintiffs restructured an existing loan with the Farm Service Agency ("FSA")[1] and signed a ten-year agreement as part of that restructuring. The agreement required plaintiffs to pay the FSA a percentage of appreciation that accrued to their property if certain triggering events transpired ("recapture"). In 1999, the FSA determined that expiration of the agreement was one of the triggering events and sought recapture. Plaintiffs sought administrative review of the FSA's determination and argued that only three events triggered recapture: full payment on the loan, cessation of farming, or transfer of the title of their property. The National Appeals Division of the Department of Agriculture found that the terms of the agreement allowed recapture at the expiration of the agreement. Plaintiffs appealed that decision to the Director of the National Appeals Division for the Department of Agriculture, who affirmed. Plaintiffs then sought judicial review of the agency's determinations and argued that they were arbitrary and capricious, contrary to law, and unsupported by substantial evidence. The district court affirmed, and plaintiffs appealed. We affirm.

I. History

A. Shared Appreciation Agreement

Plaintiffs, Donald and Patsy Israel and Richard and Shirley Quinton, own a farming partnership called Israel and

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[1] The FSA was formerly called the Farmers Home Administration.

Quinton Farms. In the fall of 1989, plaintiffs were indebted to the FSA in the amount of $ 239,478.91. After negotiating with the FSA, the FSA reduced ("wrote down") plaintiffs' loan by $ 100,357.34. Plaintiffs were thus left with a restructured debt of $ 139,121.57, which was secured by a preexisting real estate mortgage.

On September 15, 1989, as consideration for their write down, plaintiffs signed a ten-year Shared Appreciation Agreement ("Agreement") with the FSA, which was secured by a separate mortgage on plaintiffs' real property. The Agreement provided:

> As a condition to, and in consideration of [FSA] writing down the above amounts and restructuring the loan, borrower agrees to pay [FSA] an amount according to one of the following payment schedules:
>
> . . .
>
> 2. Fifty (50) percent of any positive appreciation in the market value of the property securing the loan above as described in the security instruments between the date of this Agreement and *either the expiration date of the Agreement or the date Borrower pays the loan in full, ceases farming or transfers title of the security,* if such event occurs after four years but before the expiration date of this Agreement.

> The amount of recapture by [FSA] will be based on the difference between the value of the security at the time of disposal or cessation by Borrower of Farming and the value of the security at the time this Agreement is entered into. If the borrower violates the terms of the agreement [FSA] will liquidate after the borrower has been notified of the right to appeal. [emphasis added]

In April 1994, plaintiffs advised the FSA that they might arrange private financing to replace their FSA loan. The FSA told plaintiffs that this would cause the Agreement to "kick in," and that plaintiffs would then owe the FSA approximately $ 23,000.00 under the terms of the Agreement.[2] Plaintiffs never obtained private financing and, thus, did not trigger the Agreement by "paying the loan in full." On January 26, 1998, the FSA sent plaintiffs a letter and advised them that the payoff amount remaining on their loan was $118,910.20. The letter did not reference the Agreement.

In letters to plaintiffs dated April 24, 1997, November 6, 1997, and October 5, 1998, the FSA wrote:

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[2] The Agreement would "kick in" because private financing would result in the FSA loan being paid off in full, one of the triggering events under the Agreement. The FSA calculated the amount owed as follows: the Agreement allowed the FSA to recapture 50 of any positive appreciation that accrued to plaintiffs' property. The appraised value of the property in 1994 was $ 198,000 and $ 152,000 in 1989. Thus, the total appreciation was $ 46,000, and the FSA was entitled to half of that amount--$ 23,000.

> Our records indicate that on September 15, 1989, the Farm Service Agency (FSA) wrote down $ 100,357.34 of your debt. As a consideration for this write down you were required to sign a Shared Appreciation Agreement (copy attached).
>
> Essentially what this document says is that if the value of your real estate increases after the date of the write down, you will be responsible for repaying some or all of the debt FSA wrote down. If any repayment is due it will become due when *any one* of the following events happens.
>
> 1. Ten Years has passed.
>
> 2. You pay the rescheduled loan in full.
>
> 3. You ceased farming.
>
> 4. You transferred title to the property.

On June 30, 1999, the FSA wrote plaintiffs a letter that stated, "the purpose of this letter is to inform you that the Shared Appreciation Agreement . . . you entered into as a result of receiving a 'debt write down' will expire on September 14, 1999, which is 10 years after the date you signed it. . . . We have determined the amount of shared appreciation due is $ 96,500." The FSA calculated the amount due by using the following equation:

$ 345,000 (current appraisal of plaintiffs' real property)

minus $ 152,000 (1989 appraisal of plaintiffs' real property)

$ 193,000 (net appreciation)

times .50 (Agreement percent share)

equals $ 96,500 (appreciation demanded)

B. Administrative Proceedings

Plaintiffs protested to the FSA, contending that under the terms of the Agreement they should not be required to pay shared appreciation. On September 9, 1999, the FSA refused to reconsider its determination and affirmed its decision to require payment of $ 96,500 in shared appreciation. The FSA noted that it was "bound by the Code of Federal Regulations," which provides that "shared appreciation is due at the end of the term of the Shared Appreciation Agreement."

On October 7, 1999, plaintiffs appealed to the National Appeals Division of the Department of Agriculture. Plaintiffs claimed, *inter alia,* that the Agreement did not allow for recapture upon the expiration of the Agreement. Plaintiffs argued that because the formula for calculating recapture did not explicitly mention the Agreement's expiration, such expiration should not be considered a triggering event. Under their view of the Agreement, recapture occurred "only where the borrower pays the loan in full, ceases farming, or transfers title of the security during the term of the

Agreement."

On December 9, 1999, Hearing Officer Benner conducted an evidentiary hearing on the matter. During that hearing, plaintiffs testified that when they signed the Agreement, they did not believe that expiration of the Agreement constituted a triggering event. Plaintiffs also stated that conversations in 1988 with Michael Drewiske and in the 1990s with Karolyn Corbett, both FSA employees, led them to believe that the expiration of the Agreement was not a triggering event.

On January 3, 2000, Hearing Officer Benner, relying in part on 7 C.F.R. Sections 1951.914 and 1922.201, held that the FSA's decision to demand $ 96,500 in shared appreciation was not erroneous. Benner wrote:

> The Appellant's Shared Appreciation Agreement (SAA) expired on September 14, 1999. . . . Therefore, the Agency decision to calculate shared appreciation due is correct according to regulations.
>
> The Appellants argue that the agreement "expired" on September 14, 1999, meaning that no shared appreciation is due. They also argue that they were told that this was the case at the time of signature. However, the agreement and the regulation clearly state that shared appreciation is due at the expiration of the agreement.

On or about February 4, 2000, plaintiffs appealed Hearing Officer Benner's decision to the Director of the National Appeals Division of the Department of Agriculture. In a decision dated March 17, 2000, Director Norman Cooper upheld Hearing Officer Benner's decision and concluded that "appellants failed to prove by a preponderance of evidence that the Agency decision was erroneous." Director Cooper stated:

> The Hearing Officer's decision is supported by substantial evidence as follows:
>
> 1. The Appellants received a $ 100,357.34 write-down of Agency debt and entered into [the Agreement] on September 15, 1989. The [Agreement] expired on September 14, 1999.
>
> 2. The market value of the Appellants' property was determined to be $ 152,000 at the time the [Agreement] was executed. As of May 20, 1999, the property was determined to have a market value of $ 345,000. The property valuation was conducted by a Certified General Appraiser and was performed in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP).
>
> 3. The Agency considered the current market value of the Appellant's property ($ 345,000), the market value upon execution of the [Agreement] ($ 152,000), and determined that the amount of recapture was 50 percent of the

> appreciated market value ($ 193,000) or $ 96,500.
>
> 4. The Appellants agreed to pay 50 percent of any positive appreciation in value of the property during the term of the [Agreement] (September 15, 1989, to September 14, 1999).
>
> 5. On September 9, 1999, the Agency affirmed its decision to require payment of $ 96,500 in appreciation under the Terms of the [Agreement].

Director Cooper concluded:

> Regulations at 7 C.F.R. § 1951.914(b) and the [Agreement] specify that the Agency can recapture a portion of the written-off debt by taking a share of any positive appreciation in the value of the real property. The Agency must collect 50 percent of any positive appreciation in the market value of the security between the date the [Agreement] was executed and the date it expires. . . .
>
> Notwithstanding the Appellants' arguments on review that the [Agreement] is ambiguous and regulations are irrelevant, the terms of the [Agreement] are clear and published regulations, by law, are a proper basis for the Hearing Officer's determination. . . .

> Substantial evidence supports the Hearing Officer's determination that the Agency did not err in establishing the amount of recapture due under the [Agreement] and requiring payment of such.

C. Judicial Review

On April 17, 2000, plaintiffs filed suit in the Western District of Wisconsin pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706. On appeal, plaintiffs relied on the lack of a specific reference to the expiration of the Agreement in the formula for calculating recapture to support their contention that the Agreement's expiration was not a triggering event. The plaintiffs also relied on their conversations with Drewiske and Corbett to support this reading of the Agreement. In the alternative, plaintiffs argued that the FSA should be estopped from collecting $ 96,500 because plaintiffs relied to their detriment on statements made by FSA officers Drewiske and Corbett.

On March 2, 2001, the district court affirmed the agency's determinations. The district court noted that "the language of the Agreement requires recovery of appreciation 'between the date of this Agreement and *either* the expiration date of the Agreement or the date Borrower pays the loan in full, ceases farming or transfers title of the security.'" The district court noted that the use of the disjunctive "or" strongly supported the position that the Agreement allowed recapture at the expiration of the Agreement, in this case on September 14, 1999. The district court rejected plaintiffs' argument that any conversation with Drewiske or Corbett should control over the plain language of the Agreement. The

district court stated that Hearing Officer Benner and Director Cooper were presented with the same evidence and found for the FSA. Further, the district court noted that it was "not the role of the [district] court to re-weigh the evidence that was presented to the agency; rather, the court must consider whether the [Agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." The district court then held that it could not conclude "that there was a clear error of judgment in the agency's interpretation of the" Agreement.

The district court also rejected plaintiffs' estoppel argument. First, the district court noted the doctrine of sovereign immunity would likely bar the use of estoppel in the present case. Even if the FSA was not immune, the district court found that plaintiffs did not satisfy an essential element of an estoppel claim because they had failed to demonstrate any affirmative misconduct by the FSA. Thus, the district court upheld the agency's determinations that expiration of the Agreement was a triggering event and that plaintiffs owed the FSA $96,500 under the terms of the Agreement. On April 17, 2001, plaintiffs appealed and asserted that the agency's determinations were arbitrary and capricious and were not supported by substantial evidence.

II. Analysis

A. Standard of Review

The agency's legal determinations will be affirmed as long as they are not arbitrary or capricious, and are in accordance with the law. *See Sierra Resources, Inc. v. Herman*, 213 F.3d 989, 992 (7th Cir. 2000). The arbitrary

and capricious standard is highly deferential, and even if we disagree with an agency's action, we must uphold the action if the agency considered all of the relevant factors and we can discern a rational basis for the agency's choice. *See Sierra Club v. Marita*, 46 F.3d 606, 619 (7th Cir. 1995). The agency's decision is not arbitrary or capricious as long as "the agency's path may be reasonably discerned." *Mt. Sinai Hospital Med. Center v. Shalala*, 196 F.3d 703, 708 (7th Cir. 1999). We will review the agency's factual findings under the substantial evidence standard. *See id.* at 709. Under this deferential standard of review, we review the entire record to see whether it contains "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Aegerter v. City of Delafield, Wis.*, 174 F.3d 886, 889 (7th Cir. 1999).

B. Review of Agency Determination

Plaintiffs contend that the agency's determinations were erroneous because expiration of the Agreement was not a triggering event under the Agreement. To determine what events triggered recapture under the Agreement, we must examine the language of the Agreement itself. First, we must determine whether the relevant clause of the Agreement is ambiguous. *See Funeral Fin. Sys. v. United States*, 234 F.3d 1015, 1018 (7th Cir. 2000). If that clause is not open to any other reasonable interpretation, and is therefore unambiguous, then the language of the Agreement must dictate the disposition of this dispute. *See id.*

The relevant provision of the Agreement provides that plaintiffs agreed to pay the FSA:

> 2. *Fifty (50) percent of any positive appreciation* in the market value of the property securing the loan above as described in the security instruments *between the date of this Agreement and either the expiration date of the Agreement* or the date Borrower pays the loan in full, ceases farming or transfers title of the security, if such event occurs after four years but before the expiration date of this Agreement.

("recapture provision") (emphasis added). Thus, in plaintiffs' case, the Agreement provides for 50% recapture of appreciation on whichever of the following dates occurs first: the Agreement's expiration on September 14, 1999, the date plaintiffs pay the loan in full, the date the plaintiffs cease farming, or the date that the plaintiffs transfer title of their property. Both parties agree that plaintiffs did not pay their loan in full, cease farming, or transfer the title of their property. Therefore, the Agreement's expiration on September 14, 1999 was the first triggering event under the recapture provision.

Plaintiffs contend, however, that the Agreement does not provide a formula for recapture at the expiration date of the Agreement, and therefore, the Agreement's expiration should not constitute a triggering event. The formula provision states that the amount of recapture "will be based on the difference between the value of the security at the time of disposal or cessation by Borrower of farming and the value of the security at the time [the] Agreement is entered into." Plaintiffs' argument is unpersuasive.

Director Cooper found that the plain language of recapture provision provides for recapture at the expiration date of the Agreement, and we agree. The recapture provision clearly states that recapture is allowed at "the expiration date of the Agreement." We reject plaintiffs' contention that the formula provision negates the clear language of the recapture provision solely because the formula provision does not mention the expiration date of the Agreement explicitly, as does the recapture provision. Because the plain language of the Agreement provides for recapture at "the expiration date of the Agreement," we cannot conclude that the agency's determinations were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "unsupported by substantial evidence." 5 U.S.C. §§ 706(2)(A), (E).

The agency's determinations are also strongly supported by the language of the relevant statute. Plaintiffs' loan was secured by a real estate mortgage that stated that the Agreement was entered into pursuant to 7 U.S.C. § 2001. Section 2001(e)(4) states that *"recapture shall take place at the end of the term of the agreement,* or sooner--(A) on the conveyance of the real security property; (B) on the repayment of the loans; (C) if the borrower ceases farming operations." *Id.* at § 2001(e)(4) (emphasis added). Thus, the quoted language demonstrates that the FSA did not err in concluding that recapture is provided for at the expiration of the Agreement.

We have found only one other court that has interpreted this type of agreement, and that court reached the same conclusion as we do now. *See In re Moncur*, No. 98-03213, 1999 WL 33287727, at *4 (Bankr. D. Idaho May 27,

1999). In *Moncur,* the bankruptcy court was faced with an identical agreement and with the same issue. After examining the agreement as a whole, as well as the federal statute and regulations concerning the agreement, the *Moncur* court concluded that "without question, the [FSA's loan] program contemplated a recapture payment at the conclusion of the [agreement] term if payment in full of the write-down balance had not been made during the term of the [agreement]." *Id.* Therefore, the bankruptcy court construed the agreement in favor of the FSA and held that recapture was allowed at the agreement's expiration. *See id.*[3]

Finally, plaintiffs appeal the district court's decision insofar as it contains a monetary judgment against them. However, the order of the district court only affirmed the agency determinations and did not result in an enforceable monetary judgment. *See Israel v. U.S. Dept. of Agr.*, 135 F. Supp. 2d 945, 954 (W.D. Wis. 2001).

III. Conclusion

For the forgoing reasons, we AFFIRM the judgment of the district court in favor of the FSA.

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[3] Plaintiffs concede that their estoppel argument is without merit, and therefore it need not be addressed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPELLANT'S BRIEF

[Dated June 5, 2001]

JURISDICTIONAL STATEMENT

A. The Agency's Jurisdiction

The United States Department of Agriculture had jurisdiction to conduct adjudicatory proceedings in this matter pursuant to 7 U.S.C. §§ 6991-7002 and 7 C.F.R. § 11.8.

B. The District Court's Jurisdiction

The district court had jurisdiction over this matter pursuant to 28 U.S.C.A. § 1346 (a), 5 U.S.C. § 6999.7, 7 C.F.R. §§ 11.12 and 11.13, and 5 U.S.C. § 701, *et seq.*

C. This Court's Jurisdiction

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1346 (a), 5 U.S.C. § 6999.7, 7 C.F.R. §§ 11.12 and 11.13, and 5 U.S.C. §§ 701, *et seq.*, and Fed. R. App. Pr. 3 and 4.

D. Filing Dates Establishing the Timeliness of the Appeal

The Judgment of the District Court was entered on March 5,2001. The Notice of Appeal was filed on April 17, 2001. *See* Fed. R. Civ. Pr. 4 (1).

Statement Concerning Final Order Doctrine

This appeal is taken from a final judgment that disposes of all claims with respect to all parties. *See* Fed. R. App. Pr. 28 (a) (2).

STATEMENT OF THE ISSUE

Whether appellees' determination that Israel & Quinton are responsible for $96,500 in "shared appreciation" is arbitrary, capricious, contrary to law, and unsupported by substantial evidence.

STATEMENT OF THE CASE

A. Nature of the Case

This is an action pursuant to the Federal Administrative Procedure Act ("APA"), 5 U.S.C. § 703, *et seq.*, seeking judicial review of the determinations of the Farm Service Agency and the Department of Agriculture (hereinafter collectively referred to as "FSA") that plaintiffs are responsible for some $96,500 in "Shared Appreciation" pursuant to a Shared Appreciation Agreement dated September 15, 1989. Those determinations were arbitrary, capricious, contrary to law, and unsupported by substantial

evidence, and appellants are requesting that they be reversed. In essence, the Farm Service Agency seeks to take from the farmers of this country money which its own contract forbids it to collect. The agency's actions are not only unsupported by *any* evidence in the record, they are plainly unjust, inequitable, and arbitrary.

B. Course of Proceedings and Disposition Below

After the relevant issues wended their way through the Department of Agriculture's administrative hearing process, this action was brought in the United States District Court for the District of Wisconsin judicial review the Federal Administrative Western a proceeding pursuant to Procedure Act, 5 U.S.C. § 701, *et seq.*[1] In an opinion dated March 2, 2001, Judge Barbara Crabb affirmed the agency's determinations.

STATEMENT OF FACTS

A. The Shared Appreciation Agreement

Donald Israel and Richard Quinton ("Israel & Quinton") have been engaged in farming operations at 2858-2859 Oak Road, Shell Lake, Wisconsin, since 1973. *Request for Direct Appeal (Appendix 21,R 113).*[2] During the late

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[1] The course of the administrative proceedings is detailed in section B below.

[2] Although the administrative record was presented in the trial court, it was not entered on the docket sheet in that court. It is

1980's, in the midst of the farm crisis during that period, the Farmers Home Administration ("FHA"), now the Farm Services Agency ("FSA"), negotiated with numerous farmers for write-downs of their existing debts, pursuant to federal statute. *Id.* As consideration for the write-down, farmers who ceased farming or sold their property during the ten year write-down period would forfeit up to 75 percent of the appreciation of the subject property that accrued over that period. *Request for Direct Appeal (Appendix 22, R 114).*

In about 1988, Israel and Quinton decided to divide their land and cattle. Although this plan was not realized, efforts to implement it caused Israel & Quinton to incur additional cost. *Request for Direct Appeal (Appendix 21, R 113).* On or about 1988, they entered into negotiations with FHA for a write-down of their existing debt, which consisted of six notes, having an aggregate principal amount of approximately $200,000. The negotiations culminated in a Shared Appreciation Agreement dated September 15, 1989. *Id.*

At the time the Shared Appreciation Agreement was signed, Mike Drewiske, FSA's Farm Loan officer in

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nevertheless mandatory that that record be considered by a reviewing court under the Administrative Procedure Act. *See Camp v. Pitts,* 411 U.S. 138 (1973).

Cites to that record are indicated herein with the prefix "R" followed by the page number of the record itself. All portions of the administrative record cited herein are contained in Appellants' Appendix, which has been prepared separately in this case pursuant to Circuit Rule 30 (b) (7).

Spooner, Wisconsin, explained to Israel & Quinton that no recapture would be made unless Israel & Quinton paid the loan in full, ceased farming operations, or transferred title of the security during the ten year write-down period. *Brief of Israel & Quinton Farms (Appendix 33, R 158).* This understanding was corroborated by subsequent discussions with Karolyn Corbett, another FSA loan official, who also told Israel & Quinton the agreement was to be so interpreted and understood. *Brief of Israel & Quinton Farms (Appendix 34, R 163).* Indeed, in a letter dated January 26, 1998, Ms. Corbett stated:

> When Donald and Richard were in our office to make your payment, you had some questions about your FSA loan account. The enclosed printout was obtained after your last payment was applied. Since we did a deferral action on your loan in 1989, the interest that was deferred has been paid in increments since that time. That deferred interest amount does not show up on the first page of the printout. I have high-lighted the figures that add up to your payoff figure (the figure circled in red).
>
> Therefore, your payoff consists of:
>
> | | |
> |---|---|
> | QUPR (principal) | 109574.90 |
> | QUIN (interest) | 586.91 |
> | CPIN (deferred interest) | 8748.45 |
> | TOTAL: | 118,910.26 |

Brief of Israel & Quinton Farms (Appendix 30-32, R 151-153)
No mention was made of recaptured appreciation or the like.

> The Shared Appreciation Agreement itself provides:
>
> As a condition to, and in consideration of FmHA writing down the above amounts and restructuring the loan, Borrower agrees to pay FmHA an amount according to one of the following payment schedules:
>
> 1. Seventy five (75) percent of any positive appreciation in the market value of the property securing the loan as described in the above security instrument(s) between the date of the Agreement, and either the expiration date of this Agreement or the date the borrower pays the loan in full, ceases farming or transfers title of the security, if such event occurs four (4) years from the date of this Agreement.
>
> 2. Fifty (50) percent of any positive appreciation in the market value of the property securing the loan above as described in the security instruments between the date of this Agreement and either the expiration date of the Agreement or the date Borrower pays the loan in full, ceases farming or transfers title of the security, if such event occurs after four (4) years but before the expiration date of this Agreement.

> The amount of recapture by FmHA will be based on the difference between the value of the security at the time of disposal or cessation by Borrower of Farming and the value of the security at the time this Agreement is entered into. If the borrower violates the terms of this agreement FmHA will liquidate after the borrower has been notified of the right to appeal.

Shared Appreciation Agreement (Appendix 12-13, R 29-30).

As the ten year anniversary of the Shared Appreciation Agreement approached, FSA began to change its tune as to the issue of recapture, and undertook a series of efforts to "enforce" its agreement in a way that would require recapture based merely upon the fact of termination of the contract. In a letter dated April 24, 1997, for example, FSA baldly opined that the Shared Agreement "says that if the value of your real estate increases after the date of the write-down, you will be responsible for repaying some or all of the debt FSA wrote down." *(Appendix 14-16, R 93-95).*

B. Administrative Proceedings

Upon learning of FSA's demand for repayment of the alleged shared appreciation, plaintiffs protested vigorously to the agency, but on September 9, 1999, FSA refused to reconsider its determinations, and affirmed its decision to require payment of $96,500 in shared appreciation. *(R 128)*

On October 7, 1999, plaintiffs filed a joint appeal before the National Appeals Division of the Department of

Agriculture. *(Appendix 21, 23, 24, R 113-119-125)*. Pursuant to that appeal request, a scheduling conference was held before David R. Benner on November 18, 1999. *(Appendix 20, R 101)*. At that scheduling conference, Israel & Quinton asked that Michael Drewiske and Karolyn Corbett be subpoenaed to attend the hearing. Drewiske was the officer who originally negotiated the Shared Appreciation Agreement, and made statements to Israel and Quinton regarding the interpretation of the agreement. *Id.* Ms. Corbett is an FSA official with particular knowledge as to the interpretation of the Agreement, and who also made statements to Israel and Quinton regarding their particular contract. *Id.* On December 2, 1999, plaintiffs requested that Russell S. Kiecker be subpoenaed to attend and testify at the hearing. *(Appendix 19, R 99)*. Mr. Kiecker, who served as Israel & Quinton's County Agent during the relevant period, was asked to speak concerning the land values in the area, and to render an opinion with regard to the appraisal that was performed on Israel & Quintons' property for purposes of calculating the appreciation. *Id.*

On December 8, 1999, Hearing Officer Benner denied all three of plaintiffs' subpoena requests. *Notice of Denial of Subpoena Request (Appendix 17-18, R 97-98)*. Pursuant to 7 U.S.C. § 6997 (c), a hearing before Mr. Benner was held on December 9, 1999. *Id.* On January 3, 2000, Hearing Officer Benner ruled that FSA's decision to demand $96,500 in Shared Appreciation from Israel & Quinton was not erroneous. *Appeal Determination (Appendix 25-28, R 134-137)*. On February 4, 2000, Israel & Quinton requested a Director Review of FSA's determinations. On or about March 17, 2000, a Final Director Review Determination was entered affirming FSA's determinations. *Statement of the Case*

(Appendix 35-38, R 173-1 76). Plaintiffs filed this action on April 17, 2000.

On March 2, 2001, the United States District Court for the Western District of Wisconsin affirmed FSA's decisions. In her opinion, Judge Crabb noted that "[a]lthough the agreement could have been written more artfully, it conveyed the basic concept that borrowers had to give up a share of the appreciation, of the loan collateral in return for the debt write-down and that this share would become due when the agreement expired..." *(Appendix 50).*

SUMMARY OF THE ARGUMENT

Against the substantial evidence in the whole record, FSA is seeking to arbitrarily and capriciously take from the Farmers of America funds which its own contract does not allow it to collect. That contract is plain on its face, and does not give rise to any right of recapture except in certain specific, named contingencies, none of which apply in this case. FSA for its part has offered no evidence in support of its claim, other than the governing regulations, which are not evidence at all, and the Shared Appreciation Agreement itself, which supports Israel & Quinton. On this record, then, the determinations of the defendants must be reversed. Simple justice, as well as reasoned judicial review, require this result. Israel & Quinton were quite simply misled by FSA as to the scope and nature of the agreement they signed. They relied upon such statements to their detriment. FSA's unprincipled retreat from those representations is, by definition, arbitrary, capricious, and contrary to law.

ARGUMENT

FSA'S Determination That Shared Appreciation is Due is Arbitrary, Capricious, Contrary to Law, and Unsupported by Substantial Evidence

A. Standard of Review

The standard of review in this case is that mandated by the Federal Administrative Procedure Act. Although this appeal is taken from the order of a United States District Court, it remains that the decision under review is that of the administrative agency whose decision resulted in judicial review. In review under the APA, the focal point "should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts,* 411 U.S. 138 (1973). The agency's determinations are reviewed pursuant to the substantial evidence test. 5 U.S.C. § 556-557; 5 U.S.C. § 706; *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S. Ct, 206, 217, 83 L.Ed. 126 (1938); *NLRB v. Columbia Enameling & Stamping Co.,* 306 U.S. 292, 300, 59 S. Ct. 501,505, 83 L.Ed. 660 (1939); *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474 (1951) The same decisions are also reviewable under the "arbitrary and capricious" standard. *Id.; Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 02(1971), *reversed on other grounds, Califano v. Sanders,* 430 U.S. 99 (1977).

B. The Scope of Review

1. Generally

5 U.S.C. § 706 provides, in relevant part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall: (1) Compel agency action unlawfully withheld or unreasonably delayed; (2) hold unlawful and set aside agency action, findings, and conclusions found to be: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;...(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency heating, provided by statute... In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party...

As Judge Leventhal noted in *Greater Boston Television Corp. v. FCC,* 444 F.2d 841, 851 (12). C. Cir. 1970), *cert denied,* 403 U.S. 923 (1971), a reviewing court must intervene when it "becomes aware...that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making." As another leading commentator has said:

> It is no longer enough for the courts regularly to uphold agency action "with a nod in the direction of the 'substantial evidence' test, and a bow to the mysteries of administrative expertise." A more positive judicial role is demanded by the changing character of administrative litigation. "Courts are increasingly asked to review administrative litigation that touches on fundamental personal interests in life, health, and liberty...To protect these interests from administrative arbitrariness, it is necessary...to insist on strict judicial scrutiny of administrative action.

B. Schwartz, *Administrative Law* § 204 581 (Little, Brown 1976), quoting *Environmental Defense Fund v. Ruckelshaus,* 439 F.2d 584, 597 (D. D.C. 1971). Where there is an agency record, review is limited to the agency record. *Schwartz* § 205 at 582.

2. The Substantial Evidence Test

The substantial evidence tests applies where the agency action is based on a public adjudicatory hearing. 5 U.S.C. § 556-557. Since that was precisely the kind of hearing held in this case, the substantial evidence test is plainly apposite. The United State Supreme Court expounded upon this type of hearing in *Morgan v. United States,* 298 U.S. 468 (1936):

> A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the

> evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a quasi-judicial character. The requirement of a "full hearing" has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The "hearing" is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The "heating" is the hearing of evidence and argument. If the one who determined the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.

The precise requisites of such hearings were set forth by Professor Pederson:

> Five independent characteristics of formal adjudication may contribute to a fair disposition of a particular case. (1) A decision based on a publicly defined and publicly accessible record; (2) a mechanism for confrontation between opposing points of view; (3) a mechanism for probing and, where possible, resolving differences on factual and

> other matters; (4) separation of functions requirements; and (5) an independent, judge-like hearing officer.

W. F. Pederson, Jr., *The Decline of Separation of Function in Regulatory Agencies,* 64 Va. L. Rev. 991 (1978).[3]

Courts and scholars alike have long sought to define the term "substantial evidence." *See generally* L. Jaffe, *Substantial Evidence on the Whole Record,* 64 Harv. L. Rev. 1223, 1235-36 (1931); Cooper, *Administrative Law: The Substantial Evidence Rule,* 44 A.B.A.J. 945, 1002-3 (1958). *In Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S. Ct, 206, 217, 83 L. Ed. 126 (1938), the United States Supreme Court defined "substantial evidence" to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." One year later, the Court held the term "means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred...[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact

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[3] Professor Pederson bemoaned a defect readily apparent in the proceedings in this case--the lack of a truly independent decisionmaker. Here, Officer Benner, the "Judge" in the appeal hearing below, is, on information and belief, an employee of the Department of Agriculture. "The current debate over when and to what extent administrative agencies should use trial-type hearings to make decisions has focused primarily on the costs and the benefits of the hearings themselves. Separation of functions requirements, however, are a more important but largely unperceived defect of these hearings." *Pederson* at 994.

for the jury." *NLRB v. Columbia Enameling & Stamping Co.*, 306 U.S. 292, 300, 59 S. Ct. 501,505, 83 L.Ed. 660 (1939). Although both these cases predate the enactment of the federal Administrative Procedure Act, they are considered authoritative in defining the words "substantial evidence" as used in the Act. *Consolo v. Federal Maritime Commission,* 383 U.S. 607, 620, 86 S. Ct. 1018, 1026, 16 LEd.2d 131 (1966).

In *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951), construing the Taft-Hartley Act, Justice Frankfurter stated in no uncertain terms that "substantial evidence" under the Administrative Procedure Act requires a thorough review *of the entire record:*

> Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting an [agency] decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that the court consider the whole record.

Id. at 479. The APA's own legislative history bears this out. "The requirement of review upon the whole record means that

courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case." Sen. Doc. No. 248, 79th Cong., 2d Sess. 214, 280 (1946).

3. The Arbitrary and Capricious Test

Even where the substantial evidence test is not applicable, the reviewing court must "engage in a substantial inquiry. Certainly, the [agency's] action is entitled to a presumption of regularity...But that presumption is not to shield [its] action from a thorough, probing, in-depth review." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971). Section 706 (A) of the APA requires a finding that the "actual choice made was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment...Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id.*

4. "Not in Accordance with Law"

The term "not in accordance with law" means just what it says. It refers to action taken without regard to existing legal authority. The government, and administrative agencies in particular, are charged to comply with their own regulations, as well as the case law and statutes of the land. An agency's disregard of governing legal principle *must* be set aside. 5 U.S.C. § 706 (2) (A).

5. The Federal Courts Have the Power to Construe the Shared Appreciation Agreement

In a stipulation designed to expedite these proceedings, the undersigned agreed to dismiss, *inter alia,* Count 2 of the Complaint, stating a claim for declaratory relief. The scope of review sought pursuant to that Count is nevertheless embraced within Count 1, which seeks judicial review pursuant to 5 U.S.C. 703, *et. seq.* 5 U.S.C. § 706 provides that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action"[4] As a contract enacted pursuant to federal regulations, the Shared Appreciation Agreement has the force of law. Indeed, its interpretation and construction presents a question of law reviewable by this court. *Lambert v. Wrensch,* 135 Wis.2d 105, 115, 399 N.W.2d 369, 373 (1987).[5]

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[4] 5 U.S.C. § 703 further provides that "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgment."

[5] In support of its view that the District Court somehow lacked the power to issue declaratory relief in construing the agreement at the heart of this case, appellee relies upon 28 U.S.C. § 1491, which confers exclusive jurisdiction upon the United States Court of Claims over declaratory actions with more than $10,000 in controversy. Such jurisdiction is concurrent with the District Courts to the extent the amount in controversy is less than $10,000. 28 U.S.C. § 1346.

C. FSA'S Determinations are Unsupported by Substantial Evidence

When the whole record in this case is examined, FSA's determinations that shared appreciation is due are seen to be without support. The cornerstone of the "evidence" in this case is, of course, the Shared Appreciation Agreement itself. The language of that agreement must, therefore, be the focus of discussion. That language states that recapture is expressly tied to only three named contingencies: cessation of fanning, transfer of the property, or payment in full. Construction of a contract is a question of law. *Lambert v.*

Curiously, the APA does not specify to which court judicial review of agency determinations is to be taken. It merely states that "a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. 7 CFR Subtitle A (1-1-98 Edition) § 11.13, meanwhile, provides that "a final determination of the Division shall be reviewable and enforceable by any United States District Court of competent jurisdiction in accordance with chapter 7 of Title 5 of the United States Code."

Other District Courts, however, have not balked at entertaining "judicial review" actions that contemplate declaratory and even injunctive relief. *See, e.g., Allison v. Block,* 723 F.2d 631 (8th Cir. 1983) ("judicial review" action following conclusion of agency proceedings maintained in United States District Court seeking declaratory and injunctive relief to prevent FmHA from foreclosing on farm loans). In any event, defendants concede federal court jurisdiction to review the determinations of the defendants, determinations which have as their entire focus the language and interpretation of the Shared Appreciation Agreement.

Wrensch, 135 Wis.2d 105, 115, 399 N.W.2d 369, 373-74 (1987). Unambiguous contract language must be construed as a whole, according to its plain meaning. *Yee v. Giuffre,* 176 Wis.2d 189, 192-93, 499 N.W.2d 926, 927 (Ct. App. 1993); *Ford Motor Company v. Lyons,* 137 Wis.2d 397, 460, 405 N.W.2d 354, 379 (Ct. App. 1987).

The Shared Appreciation Agreement expressly ties recapture to three specific contingencies. It further explicates how the recapture contingencies operate, stating expressly that "[t]he amount of recapture by FmHA will be based on the difference between the value of the security at the time of disposal or cessation by Borrower of Fanning and the value of the security at the time this Agreement is entered into." Thus, under the language of the agreement, interpreted reasonably and as a whole, recapture occurs only where the borrower pays the loan in full, ceases farming, or transfers title of the security during the term of the agreement. No such contingency happened in this case. Under the plain language of the Shared Appreciation Agreement, FSA is not entitled to recapture appreciation here. Nowhere is there a provision for recapture of ten years of appreciation arising upon termination of the agreement. Indeed, the apparent intent of the Agreement is to penalize farmers who get out of the program early, either by selling their farm or ceasing farming altogether. Farmers who stick with the program, as Israel & Quinton did, get a reduced recapture obligation, logically culminating in no recapture obligation if the farmer remains farming during the term of the Agreement.

All the evidence in this case supports this conclusion. Indeed, FSA submitted no evidence to the contrary. Israel & Quinton agreed to pay FmHA seventy five percent of any

positive appreciation in the market value of the property between the date of the Agreement, and either the expiration date of the Agreement or the date they paid the loan in full, ceased farming or transferred title of the security, if such event occurred four (4) years from the date of the Agreement, or fifty (50) percent of any appreciation that accrued between the date of the Agreement and either the expiration date of the Agreement or the date Israel & Quinton paid the loan in full, ceased farming or transferred title of the security, if such event occurred after four (4) years but before the expiration date of the Agreement. The Agreement further expressly provides:

> The amount of recapture by FmHA will be based on the difference between the value of the security at the time of disposal or cessation by Borrower of Farming and the value of the security at the time this Agreement is entered into. If the borrower violates the terms of this agreement FmHA will liquidate after the borrower has been notified of the right to appeal.

When this language is properly construed, it plainly provides that no recapture is required unless the borrower ceases farming or transfers title during the term of the Agreement. The following Exhibit, made part of the record below, indicates this plainly:

> **As a condition to, and in consideration of FmHA writing down the above amounts and restructuring the loan, Borrower agrees to pay FmHA an amount according to one of**

the following payment schedules:

1. Seventy five percent of any positive appreciation in the market value of the property securing the loan as described in the above security instrument(s) between the date of the Agreement, and either the expiration date of this Agreement or the date the borrower pays the loan in full, ceases farming or transfers title of the security, if such event occurs four (4) years from the date of this Agreement.

2. Fifty (50) percent of any positive appreciation in the market value of the property securing the loan above as described in the security instrument between the date of this Agreement and either the EXPIRATION DATE OF THE AGREEMENT or the date Borrower PAYS THE LOAN IN FULL, CEASES FARMING or TRANSFERS TITLE OF THE SECURITY, if such event occurs after four (4) years but before the expiration date of this Agreement.

The amount of recapture by FmHA will be based on the difference between the value of the security at the time of DISPOSAL or CESSATION BY BORROWER OF FARMING and the value of the security at the time this Agreement is entered into. If the borrower violates the terms of this

agreement FmHA will liquidate after the borrower has been notified of the right to appeal.

Here it is clearly seen that there is no formula for recapture that corresponds to the "expiration date of the agreement" clause, rendering it impossible to determine how recapture would be calculated upon expiration. One could only speculate. But of course the contract, and the plain intent of the parties to it, never contemplated that the mere expiration of the Agreement would trigger recapture of appreciation.

Disingenuously, FSA seeks to ignore the language of its own contract, and instead refers to the language of the regulations relating to shared appreciation agreements in general. Those regulations, however, are not part of the agreement at issue here; nor does that agreement, either expressly or impliedly, incorporate those regulations by reference. Thus, the language of the regulations is irrelevant to the interpretation of the Shared Appreciation Agreement. The Plaintiffs did not negotiate and sign the Code of Federal Regulations. FSA cannot avoid the four comers of its own contract with reference to regulations that are not part of that agreement. To do so is unfair, inequitable, and squarely at odds with the law of contract.

Words or phrases in a contract are ambiguous when they are reasonably susceptible of more than one meaning. *See Patti v. Western Mach. Co.*, 72 Wis.2d 348, 351-52, 241 N.W.2d 158, 160 (1976). When a contract is ambiguous, parol evidence is admissible as a means of arriving at the intent of the parties. Such evidence is also admissible where

fraud, misrepresentation, or duress is present. *Pleasure Time, Inc. v. Kuss,* 78 Wis.2d 373,379, 254 N.W.2d 463,467 (1977); *Spring Valley Meats v. Dairyland,* 94 Wis.2d 600, 606-07, 288 N.W.2d 852, 855 (1980).[6] In this case, all the negotiations leading up to the Shared Appreciation Agreement, as well as conversations afterwards, led Israel & Quinton to believe that no recapture would occur unless, during the term of the Agreement, they ceased fanning or transferred title to the security. Relying upon these negotiations, they entered into the Agreement. In particular, the loan officer with whom Israel & Quinton originally negotiated, orally confirmed their understanding and interpretation of the Agreement. *(Appendix 33, R158).* That officer's interpretation was subsequently confirmed by other FSA officials.

The Officers who made these statements were not produced at the adjudicatory hearing. Their statements, related through the plaintiffs' filings in the proceedings

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[6] The parol evidence role provides that where the parties to a contract embody their agreement in writing and specifically intend the writing to be the final expression of their agreement, the terms of the writing may not be varied or contradicted by evidence of any prior written or oral agreement in the absence of fraud, duress, or mutual mistake. *Spring Valley Meats v. Dairyland,* 94 Wis.2d 600, 606-07, 288 N.W.2d 852, 855 (1980). "The real question when a party invokes the parol evidence rule is whether the parties intended the written agreement to be final and complete or 'integrated,' or whether they intended any prior agreements to be part of their total agreement. *Id.* at 607, 288 N.W.2d at 855. Significantly, the Shared Appreciation Agreement does not contain a merger clause.

below, are therefore uncontradicted, and must be taken as true. The whole record in this case thus consists of the Shared Appreciation Agreement itself, together with the statements and admissions made in connection therewith by FSA officials. FSA, for its part at the adjudicatory hearing, put on no evidence whatsoever to support its quest for shared appreciation. The determinations of the defendants that such appreciation is due under the facts and circumstances of this case were not supported by substantial evidence, and those determinations must be reversed.

D. FSA'S Determinations are Arbitrary and Capricious and Contrary to Law

Even under the milder "arbitrary and capricious" standard of review, defendants' determinations will not stand. The term "arbitrary and capricious" describes agency action that is willful and unreasonable, taken without consideration or in disregard of facts, or without determining principle. H. C. Black, *Black's Law Dictionary* 96 (1986); *Elwood Investors Co. v. Behme,* 79 Misc.2d 910, 361 N.Y.S.2d 488,492.

In *Universal Camera*, 340 U.S. 474 (1951). Justice Frankfurter defined the term "substantial evidence" to mean "such relevant evidence as a reasonable mind might accept as adequate to support [the] conclusion." In fact, the arbitrary and capricious test can mean no less. "A governmental decision that failed to pass the substantial evidence test, on a judicial finding that a reasonable mind could not have found the facts adequate to support the conclusion, must equally well have failed scrutiny on the 'lower' standard of arbitrary and capricious review. Both tests require that the normative

conclusion as defined by relevant legal standards be supported by sufficient facts." Z. Plater and W. Norine, *Through the Looking Glass of Eminent Domain: Exploring the Arbitrary and Capricious Test and Substantive Rationality Review of Government Decisions,* 16 Boston College Environmental Affairs L. Rev. 661, 717 (1989). Analytically, the elements of the arbitrary and capricious inquiry are familiar. "If a court decides that a reasonable mind, given the legal norm to be applied and the particular facts of the case, could not have reached that particular determination, the governmental action is void for arbitrariness." *Id.* at 718-19.

1. Construed as a Whole, the Shared Appreciation Agreement Only Provides for Recapture Where One of Three Referenced Contingencies Exists

Construction of a contract is a question of law. *Lambert v. Wrensch,* 135 Wis.2d 105, 115, 399 N.W.2d 369, 373 (1987). When contract language is ambiguous, the contract must be construed as a whole, in accord with its plain meaning. *Yee v. Giuffre,* 176 Wis.2d 189, 192-93,499 N.W.2d 926, 927 (Ct. App. 1993); *Ford Motor Co. v. Lyons,* 137 Wis.2d 397,460, 405 N.W.2d 354, 379 (Ct. App. 1987). The Shared Appreciation Agreement is plain on its face. It sets forth, in plain language, three, and only three, explicit and discrete contingencies under which recapture would be permitted. It further explicates how the recapture contingencies operate, stating expressly that "[t]he amount of recapture by FmHA will be based on the difference between the value of the security at the time of disposal or cessation by Borrower of Farming and the value of the security at the time this agreement is entered into." Thus, under the plain language of the agreement, FSA is not entitled to recapture

appreciation in this case. Nowhere is there a provision for recapture of ten years of appreciation, arising upon termination of the agreement. Indeed, the scheme of the Agreement is to "penalize" Farmers who get out of the program early. The Farmer who sticks with the program gets a reduced recapture obligation, logically culminating in no recapture obligation if the Farmer remains farming during the term of the Agreement.

As set forth above, the Shared Appreciation Agreement plainly does not support recapture of Shared Appreciation under the facts and circumstances of this case. Rather, FSA is entitled to claim recapture only upon the happening of any one of three named contingencies. There is no dispute that none of those contingencies occurred here. The mere termination of the agreement does not trigger recapture, and FSA's determinations to the contrary are arbitrary and capricious.

2. To the Extent the Shared Appreciation Agreement is Ambiguous it Must Be Construed Against the Draftsman, FSA

Contractual language is ambiguous if it is reasonably susceptible of more than one construction An ambiguous contract must be strictly construed against the draftsman. *North Gate Corp. v. National Food Stores,* 30 Wis.2d 317, 322, 140 N.W.2d 744 (1966).

Seeking to enforce the Agreement in its own favor, FSA must argue, in effect, that the agreement is subject to more than one interpretation. FSA may, on the one hand, assert that because paragraph one obliquely refers to

termination of the agreement, it is also a contingency which would result in recapture of appreciation. The question then becomes, recapture of what, and how much? And here the agreement offers no help to FSA, stating only that the amount of recapture will be based upon "the difference between the value of the security at the time of disposal or cessation by Borrower of Farming and the value of the security at the time this Agreement is entered into." To seek to recapture some arbitrary amount at the termination date of the agreement is utterly without basis in the contract. To that extent, then, the agreement is ambiguous, and susceptible to more than one construction. Since FSA drafted the agreement, the contract must be construed in favor of Israel & Quinton. *North Gate Corp. v. National Food Stores,* 30 Wis.2d 317,322, 140 N.W.2d 744 (1966).

FSA, it appears, is aware of the ambiguities in its own contract, and has frantically sought to "clarify" the contractual language in a series of letters to its constituents. The letter sent to Israel & Quinton provides:

> Essentially what [the Shared Appreciation Agreement] says that if the value of your real estate increases after the date of the write down, you will be responsible for repaying some or all of the debt FSA wrote down. If any repayment is due it will become due with any one of the following events happens: 1. Ten years has passed. 2. You pay the rescheduled loan in full. 3. You cease farming. 4. You transferred title to the property. This notice is to remind you of your potential obligation to repay all or a portion of the debt

> that the Farm Service Agency (formerly FmHA) wrote down.

(Appendix 14-16, R93-95).

This, of course, is *not* what the Agreement says. Nowhere does this letter explain--nor *could* it explain--how the amount of appreciation is calculated where the triggering event is merely the termination of the agreement. FSA simply cannot impose such a formula in the absence of contractual language so providing. To do so is arbitrary, capricious, and contrary to law.

Again, where in the agreement is there any basis for setting the amount of appreciation as of the termination date of the agreement? There is none. And FSA cannot simply take advantage of its own ambiguous contract, to the detriment of Israel & Quinton. In fact those parties were told all along the agreement would be construed the way they understood it, and the only way in which the agreement makes any sense.

In this case, the actions of FSA and its officials, and that of the Hearing Officer in upholding them, are manifestly arbitrary and capricious. Indeed, the numerous representations and statements made to Israel and Quinton are the very definition of arbitrariness. In this particular case, in fact, they are not only examples of arbitrary and capricious conduct; they give rise to an estoppel.

The doctrine of equitable estoppel precludes a litigant from asserting a claim or defense which might otherwise be available to him against another party who has detrimentally

altered his position in reliance on the former's misrepresentation. *Portmann v. United States,* 674 F.2d 1155 (7th Cir. 1982); Note, *Estoppel of the Government,* 47 Brooklyn L. Rev. 423, 424 (1981). The general rule has long been that estoppel will not lie against the government. *Gressley v. Califano,* 609 F.2d 1265 (7th Cir. 1979); *Hicks v. Harris,* 606 F.2d 65 (5th Cir. 1979). This rule rested upon considerations of sovereign immunity. Since the government could not be held liable for the wrongful acts of its agents, it followed that the government could not be estopped by the misrepresentations or material omissions of its employees. *Hart v. United States,* 95 U.S. 316, 318 (1877); *See also* 2 K. Davis, *Admin. Law Treatise* § 17.01 at 491 (1958). As sovereign immunity eroded, courts sought new justifications for retaining the old rule barring estoppel against the government. Some courts adopted a "separation of powers" rationale. *See Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380, 385 (1947); *Goldberg v. Weinberger,* 546 F.2d 477 (2d Cir. 1976). Other courts have relied upon considerations of public policy. *Portmann,* 674 F.2d at 1159. Reflecting upon the state of the law in 1973, Professor Asimow wrote:

> The present case law involving estoppel against the government presents an uninspiring picture of injustice, anachronism, and rampant confusion. At the same time, the personnel of almost every government agency represents that the reliance interest of private parties who had been misled by poor advice would always be protected. The fact that such a policy seems to be practical suggests that the case law is in drastic need for reconsideration.

M. Asinow, *The Reliability of Government Advice* 68 (1973). And today there are indeed cases in which "the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor and reliability in their dealings with their government." *Heckler v. Community Health Services,* 467 U.S. 51, 60-61 (1984).

In Portmann v. United States, 674 F.2d 1155 (7th Cir. 1982), which involved a misrepresentation brought against the Postal Service, the Seventh Circuit soundly rejected a rigid bar to estoppel against the government. Instead, the court, while rejecting any "single factor analysis," recognized the distinction, developed in a long line of distinguished cases, between "proprietary" government action and "sovereign" activity. Only when engaged in the latter is the government immune from estoppel. Under this approach, activities undertaken for the commercial benefit of the government or an individual government agency are subject to estoppel, while actions involving the exercise of exclusively governmental powers are not. *See, e.g., Russell Corp. v. United States,* 537 F.2d 474, 484 (Ct. Cl. 1976), *cert. denied,* 429 U.S. 1073 (1977) (doctrine of equitable estoppel will be applied, in appropriate case, to prevent United States from denying existence ora contractual agreement); *Roberts v. United States,* 357 F.2d 938, 946-47 (Ct. Claims 1966) (when government is acting in its proprietary capacity, it may be estopped by an act of waiver in the same manner as a private contract). Specifically, the *Portmann* court held that while the proprietary or commercial character of the transaction "militates in favor of allowing an estoppel claim," it is not determinative in all situations. Specifically, where the

government has entered into written agreements which support the claims of estoppel, the claim should be allowed. *Id.*

In this case, FSA, acting essentially as a bank and, as it turned out, in competition with other available lenders, entered into a written agreement coupled with promises and representations as to the meaning of that agreement. At the time the Shared Appreciation Agreement was signed, Mike Drewiske, FSA's Farm Loan officer in Spooner, Wisconsin, told Israel & Quinton no recapture would be made unless Israel & Quinton paid the loan in full, ceased farming operations, or transferred title of the security during the ten year write down period. *Brief of Israel & Quinton Farms (Appendix 33, R 158).* Drewiske's own notes bear this out entirely:

> Richard Quinton and Donald Israel c/o. They thought they might be able to get a loan from a Bank to refinance FmHA loan. I indicated that at such a time as they pay us in full the shared appreciation agreement kicks in.

(Appendix 29, R 150). Relying upon this representation, Israel & Quinton decided not to pursue bank financing of their loan. They did so to their obvious detriment. Drewiske's representation was echoed by subsequent discussions with Karolyn Corbett, another FSA loan official, who also told Israel & Quinton the agreement was to be so interpreted and understood. *Id. (Appendix 34, R 163).* Nevertheless, none of these witnesses were produced at the hearing, despite plaintiffs' request that they be present.

This, then, is a case where estoppel should be applied. Although this court may not be the proper forum to hear a classic estoppel claim, the argument is advanced herein as support for Israel & Quintons' view that FSA's actions in this case were arbitrary, capricious, and contrary to law. Certainly where an agency fails to follow its own precedential statements and procedures as they relate to a proprietary, contractual transaction, its actions defy rule and principle and are, by definition, arbitrary and subject to reversal.

THE DISTRICT COURT LACKED JURISDICTION TO RENDER A "MONEY JUDGMENT" OF $96,500

After engaging in a "deferential" review of the agency record, but without the benefit of judicial mechanisms like discovery or a hearing, the District Court stated it "could not find that the director's decision was arbitrary, capricious, on abuse of discretion, or otherwise not in accordance with law." It therefore affirmed those determinations.

According to the government's reading of the judgment, however, the District Court did not stop there. According to FSA, the District Court went on, to issue its own *money judgment* -- supported by no live testimony or any other means of thorough judicial determination of fact. That judgment, if that is what it is,[7] was issued *sans* any of the procedural safeguards Israel & Quinton would be accorded in

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[7] The District Court's judgment can also be reasonably read as a mere affirmance of FSA's determinations that does not represent a money judgment of the court that could be executed on without resort to a civil action.

a civil lawsuit, such as requiring the "plaintiff" to prove its case. It violated Israel & Quinton's due process and jury trial rights contained in the Fifth and Seventh amendments to the United States Constitution. The Fifth Amendment to the United States Constitution provides in relevant part that "[n]o person shall be deprived of life, liberty, or property without due process of law..." U.S. Const., Amendment V. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950). The Due Process clause "is a guarantee of fair procedure, sometimes referred to as 'procedural due process': the State may not...take property without providing appropriate procedural safeguards." *Daniels v. Williams,* 106 S. Ct. 662, 677-668 (concurring opinion). As Justice Frankfurter said in *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123 (1951), "[d]ue process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental fairness, it is also a living principle not confined to past instances." The Seventh Amendment provides that "[I]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law "An action in contract is indisputably a suit at common law.

The only issue before the District Court in this case was whether the determinations of the FSA, the party with

whom Israel & Quinton contracted at the first, were arbitrary, capricious, unsupported by substantial evidence, and contrary to law. The district court was empowered not to make its own findings, but to review the agency record and affirm, reverse, or remand the agency's determinations for further proceedings. It was not called upon, and could not have been called upon, to render its own money judgment -- a judgment which in this case lacked all the requisites of judicial fairness and due process.

The District Court's judgment, which the government now intends to "levy upon," was not only beyond the contemplation of the Administrative Procedure Act.[8] The parties themselves expressly limited the issues before the court by stipulation, a stipulation the government insisted upon, lest it challenge the District Court's jurisdiction to issue declaratory relief in this case. The government insisted, and the undersigned eventually agreed, that the District Court's review would be limited to just that -- a *review,* of the FSA's determinations, and an opinion as to whether those determinations were arbitrary, capricious, or unsupported by substantial evidence. The stipulation provided:

> The only issue before the Court in this case is the judicial review of the Acts and

---

[8] The Administrative Procedure Act, while providing a basic structure for agency decisionmaking and judicial review of agency determinations, does not alone address all procedural concerns. Indeed, the APA itself states that none of its provisions "limit or repeal additional requirements imposed by statute or otherwise recognized by law." 5 U.S.C. § 559.

> Determinations of the Farm Service Agency and the Department of Agriculture,, pursuant to Section 703 of the Administrative Procedure Act, as set forth in Count 1 of the Complaint. Counts 2, 3, and 4 of the Complaint shall be dismissed.

Judge Crabb adopted this stipulation in the following Order:

> Based upon the foregoing stipulation of the parties, IT IS HEREBY ORDERED THAT there shall be a Final Hearing, for purposes of Oral Argument, on April 16, 2001 9:00 a.m. for the purpose of hearing and resolving the issues in this case, which concern judicial review of the Acts and Determinations of the Farm Service Agency and the Department of Agriculture, pursuant to Section 703 of the Administrative Procedure-Act, as set forth in Count 1 of the Complaint. Counts 2, 3, and 4 of the Complaint are dismissed.

Counts 2, 3, and 4 of the complaint asserted common law claims for declaratory relief, negligent misrepresentation, and an injunction.

Thus the issue, as framed by the parties and the court, was not whether Israel & Quinton are "liable" to FSA. Yet the government, having never brought suit in court, and having failed to bring a counterclaim herein, finds itself with a *money judgment,* without having proved its case, and without subjecting itself to the rigors of discovery or motion practice. All the while it has benefitted by a deferential

"burden of proof" that made "victory" highly likely, if not inevitable. For Israel and Quinton, this strange denouement represents the last affront in a long, bewildering, and ultimately frustrating battle to protect their substantive rights, and to exercise their procedural rights to be heard.

FSA's determinations, although based upon what are denoted as "quasi-judicial" proceedings, are not the judgments of a court. If Israel and Quinton had not sought judicial review, FSA could not have "docketed" its determinations. It would still have been required to sue Israel & Quinton based upon the Shared Appreciation Agreement. That civil action would have been subject to the full panoply of procedural safeguards embodied in the Federal Rules of Civil Procedure or their state court equivalents, Indeed, FSA stipulated to take no such action during the course of these proceedings. *(Docket 012)*. Israel & Quinton would have had the right to a jury trial. The "judge" in that proceeding would not be a hearing officer employed by the "plaintiff." Nor could Israel & Quinton have obtained a money judgment for contractual damages in this case. According to the governments own assertions in the lower court, 28 U.S.C. § 1491 confers exclusive jurisdiction upon the United States Court of Claims over declaratory actions with more than $10,000 in controversy. Such jurisdiction is concurrent with the District Courts to the extent the amount in controversy is less than $10,000. 28 U.S.C. § 1346.

The District Court, applying a highly deferential standard of judicial review, cannot employ that review process to transform mere administrative determinations into a money judgment. To obtain a money judgment in an Article III federal court, or in a state court, the plaintiff must prove,

by a preponderance of the evidence, that it is entitled to relief. That requirement does not change merely because a party seeks judicial review of agency determinations pursuant to the Administrative Procedure Act.[9]

The regulatory scheme itself does not confer upon FSA any power to issue a money judgment. It is rather a series of rules setting forth procedures for servicing the loan, and defining and governing events of default. *See, e.g.*, 7 C.F.R. § 1951.914. Significantly, the mortgage the government issued to Israel & Quinton provides that in the event of default FSA would have the fight "to foreclose [the] instrument as provided by law." *(R 33, Appendix 61)*.

Even without the stipulation and order that was entered in this case, the judgment of the District Court would have been limited in effect to deciding the question not whether the government--who after all is the *defendant* in this case, not the plaintiff--is entitled to a money judgment, but merely whether its determinations were arbitrary, capricious, and contrary to law. And indeed, that is all the court "found" in this case. On the record it reviewed, it could find nothing

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[9] 28 U.S.C. § 2415 expressly contemplates that the conclusion of administrative proceedings in the government's favor does not alleviate the need for a civil action to obtain a money judgment at contract. It provides that "every action brought by the United States or any officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or *within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later.*" (Emphasis added).

more. Its money judgment, rendered without a trial or even a hearing, without the government even having filed an action, and at odds with the court's earlier order in this case, must be reversed.

CONCLUSION

For all foregoing reasons, the determinations of the Farm Service Agency and the United States Department of Agriculture must be reversed.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. PR. 32 (a) (7).

The undersigned hereby certifies that this Brief complies with Fed. R. App. Pr. 32 (a) (7) because it contains 6785 words, and is no more than 30 pages in length. 12-point type has been used as provided by Circuit Rule 32. 12-point type has been used for footnotes consistent with Circuit Rule 32.

STEPHENSON & SANFORD, P.L.C.

By /s/ _____
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APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

No. 00-C-223-C

[Filed March 22, 2001]

Donald and Patsy Israel, husband and wife, Richard and Shirley Quinton, husband and wife, all d/b/a Israel and Quinton Farms,	)
Plaintiffs,	)
v.	)
United States Department of Agriculture,	)
Defendant.	)

OPINION AND ORDER

This is a civil action in which plaintiffs Donald and Patsy Israel and Richard and Shirley Quinton seek judicial review of the Farm Service Agency's determination that plaintiffs are responsible for $96,500 in shared appreciation pursuant to a shared appreciation agreement dated September 15, 1989, a decision that was affirmed by the National

Appeals Division and the Director of the National Appeals Division. (The Farm Service Agency is an administrative agency of the United States Department of Agriculture.)

Originally, plaintiffs sought judicial review of the agency's determination (count 1); a declaration as to the meaning of the shared appreciation agreement (count 2); injunctive relief for a state claim of negligent misrepresentation (count 3); and injunctive relief prohibiting defendant from collecting any appreciation (count 4). In a stipulation and order entered on October 23, 2000, the parties agreed to dismiss counts 2, 3 and 4, set a hearing for oral argument on April 16, 2001, and brief the issue of plaintiffs' challenge to the agency's determination that they are responsible for $96,500 in shared appreciation. Briefing on plaintiffs' request for judicial review is now complete. The decision of the Director of the National Appeals Division will be affirmed because I conclude that (1) when he determined that the shared appreciation agreement allowed the government to recover 50% of the appreciated value of plaintiffs' property upon the expiration of the agreement, his decision was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "unsupported by substantial evidence," 5 U.S.C. § 706(2)(A), (E); and (2) plaintiffs cannot rely on the doctrine of equitable estoppel to prevent defendant from collecting the appreciation.

Subject matter jurisdiction is present under 7 U.S.C. § 6999 ("A final determination of the Division shall be reviewable and enforceable by any United States district court of competent jurisdiction in accordance with chapter 7 of Title 5.").

From the administrative record, I find the following facts.

FACTS

A. Shared Appreciation Agreement

Plaintiffs Donald and Patsy Israel and Richard and Shirley Quinton own a farming partnership called Israel and Quinton Farms. In 1988, Israel and Quinton Farms entered into negotiations with Farm Service Agency (formerly Farm Home Administration) for a write-down of their existing loans. On September 15, 1989, the parties signed a shared appreciation agreement, which was a condition to the debt write-down. At that time, plaintiffs had $239,478.91 in debt. Pursuant to the agreement, plaintiffs received a write-down in the amount of $100,357.34, leaving a restructured debt of $139,121.57, which was secured by preexisting real estate mortgages. At the time of the agreement, the market value of the property securing the loan was $152,000.

The shared appreciation agreement provides:

> As a condition to, and in consideration of [Farm Service Agency] writing down the above amounts and restructuring the loan, borrower agrees to pay [Farm Service Agency] an amount according to one of the following payment schedules:
>
> 1. Seventy five (75) percent of any positive appreciation in the market value of the property securing the loan as described in the

above security instrument(s) between the date of the Agreement and either the expiration date of this Agreement or the date the borrower pays the loan in full, ceases farming or transfers title of the security, if such event occurs four (4) years from the date of this Agreement.

2. Fifty (50) percent of any positive appreciation in the market value of the property securing the loan above as described in the security instruments between the date of this Agreement and either the expiration date of the Agreement or the date Borrower pays the loan in full, ceases fanning or transfers title of the security, if such event occurs after four years but before the expiration date of this Agreement.

The amount of recapture by [Farm Service Agency] will be based on the difference between the value of the security at the time of disposal or cessation by Borrower of Fanning and the value of the security at the time this Agreement is entered into. If the borrower violates the terms of this agreement [Farm Service Agency] will liquidate after the borrower has been notified of the right to appeal.

In notes dated April 5, 1994, Farm Service Agency loan officer Michael Drewiske wrote, "Richard Quinton and Donald Israel thought they might be able to get a loan from

a Bank to refinance [Farm Service Agency] loan. I indicated that at such a time as they pay in full the shared appreciation agreement kicks in."

In a letter to plaintiffs Patsy and Donald Israel dated January 26, 1998, Farm Service Agency loan official Karolyn Corbett wrote,

> When Donald and Richard were in our office to make your payment, you had some questions about your [Farm Service Agency] loan account.
>
> The enclosed printout was obtained after your last payment was applied. Since we did a deferral action on your loan in 1989, the interest that was deferred has been paid in increments since that time.
>
> That deferred interest amount does not show up on the first page of the printout. I have high-lighted the figures that add tip to your payoff figure (the figure circled in red).
>
> Therefore, your payoff consists of:
> QUPR (principal) = $109,574.90
> QUIN (interest) = $ 586.91
> CPIN (deferred interest) = $ 8,748.45
> $ 118,910.26

In letters to plaintiffs dated April 24, 1997, November 6, 1997 and October 5, 1998, District Credit Manager David

Borman wrote,

> Our records indicate that on September 15, 1989, the Farm Service Agency (FSA) wrote down $100,357.34 of your debt. As a consideration for this write down you were required to sign a Shared Appreciation Agreement (copy attached).
>
> Essentially what this document says is that if the value of your real estate increases after the date of the write down, you will be responsible for repaying some or all of the debt [Farm Service Agency] wrote down. If any repayment is due it will become due when *any one* of the following events happens.
>
> 1. Ten years has passed.
> 2. You pay the rescheduled loan in full.
> 3. You ceased farming.
> 4. You transferred title to the property.

B. Administrative Proceedings

On June 30, 1999, the Farm Service Agency wrote plaintiffs letters stating, "The purpose of this letter is to inform you that the Shared Appreciation Agreement (SAA) you entered into as a result of receiving a 'debt write down' will expire on September 14, 1999, which is 10 years after the date you signed it... We have determined the amount of shared appreciation due is $96,500." Farm Service Agency calculated the amount due by using the following equation:

	$345,000	(current appraisal)
-	$152,000	(1989 appraisal)
	$193,000	(net appreciation)
x	.50	(shared appreciation agreement sharing percentage)
	$96,5000	

In letters to plaintiffs dated September 9, 1999, the Farm Service Agency denied their requests for reconsideration and affirmed its decision to require them to pay $96,5000 in shared appreciation. The agency noted, "The Farm Service Agency is bound by the Code of Federal Regulations. [7 C.F.R. § 1951.914] covers servicing Shared Appreciation Agreements. [7 C.F.R. § 1951.914(b)] states in part, shared appreciation is due at the end of the term of the Shared Appreciation Agreement."

On October 7, 1999, plaintiffs appealed to the National Appeals Division of the Department of Agriculture. (Plaintiffs' appeals were consolidated.) On November 18, 1999, a scheduling conference was held before Farm Service Agency Hearing Officer David Benner. In letters dated December 1 and 2, 1999, plaintiffs requested the issuance of subpoenas for the production of three witnesses: two Farm Service Agency employees who had made statements to plaintiffs regarding the shared appreciation agreement (Michael Drewiske and Karolyn Corbett) and one former county agent who had an opinion on the appraisal of plaintiffs' property (Russell Kiecker). In a notice dated December 8, 1999, Benner denied plaintiffs' request for subpoenas. On December 9, 1999, an evidentiary hearing was held before Hearing Officer Benner pursuant to 7 U.S.C. § 6997(c). At the hearing, plaintiffs testified about what

Michael Drewiske and Karolyn Corbett had told them about the recapture provision in the agreement. On January 3, 2000, relying on 7 C.F.R. §§ 1951.914, 1922.201, Hearing Officer Benner held that the Farm Service Agency's decision to demand $96,500 in shared appreciation was not erroneous. Benner wrote,

> The Appellants' Shared Appreciation Agreement (SAA) expired on September 14, 1999 .... Therefore the Agency decision to calculate shared appreciation due is correct according to regulations.
>
> The Appellants argue that the agreement "expired" on September 14, 1999, meaning that no shared appreciation is due. They also argue that they were told that this was the case at the time of signature. However, the agreement and the regulation clearly state that shared appreciation is due at the expiration of the agreement.

On or about February 4, 2000, plaintiffs appealed to the Director of the National Appeals Division for the Department of Agriculture. In a decision dated March 17, 2000, Director Norman Cooper upheld the hearing officer's decision, concluding that "[a]ppellants failed to prove by a preponderance of evidence that the Agency decision was erroneous." In a written decision, Director Cooper stated the following:

The Hearing Officer's decision is supported by substantial evidence as follows:

1. The Appellants received a $100,357.34 write-down of Agency debt and entered into a [Shared Appreciation agreement] on September 15, 1989. The [Shared Appreciation Agreement] expired on September 14, 1999. (Findings of Fact (FOF) 1 and 2.)

2. The market value of the Appellants' property was determined to be $152,000 at the time the [Shared Appreciation Agreement] was executed. As of May 20, 1999, the property was determined to have a market value of $345,000. The property valuation was conducted by a Certified General Appraiser and was performed in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP). (FOF 2 and Hearing Officer Conclusion 2.)

3. The Agency considered the current market value of the Appellants' property ($345,000), the market value upon execution of the [Shared Appreciation Agreement] ($152,000), and determined that the amount of recapture was 50 percent of the appreciated market value ($193,000) or $96,5000. (FOF 2 and 3.)

4. The Appellants agreed to pay 50 percent of any positive appreciation in value of the

> property during the term of the [Shared Appreciation Agreement] (September 15, 1989, to September 14, 1999). (FOF 1)
>
> 5. On September 9, 1999, the Agency affirmed its decision to require payment of $96,500 in appreciation under the Terms of the [Shared Appreciation Agreement]. (CR I, Tab 6.)

Director Cooper concluded the following:

> Regulations at 7 C.F.R. § 1951.914(b) and the [Shared Appreciation Agreement] specify that the Agency can recapture a portion of the written-off debt by taking a share of any positive appreciation in the value of the real property. The Agency must collect 50 percent of any positive appreciation in the market value of the security between the date the [Shared Appreciation Agreement] was executed and the date it expires ....
>
> Notwithstanding the Appellants' arguments on review that the [Shared Appreciation Agreement] is ambiguous and regulations are irrelevant, the terms of the [Shared Appreciation Agreement] are clear and published regulations, by law, are a proper basis for the Hearing Officer's determination. ... Substantial evidence supports the Hearing Officer's determination that the Agency did not err in establishing the amount of the

recapture due under the [Shared Appreciation Agreement] and requiring payment of such.

OPINION

A. Background

The Farm Service Agency makes farm operating loans, farm ownership loans and emergency loans. *See* 7 C.F.R. Parts 1941, 1943 and 1945. The Agricultural Act of 1987 allows farmers who are in default to apply for various loan servicing and debt restructuring options. One of the benefits offered through the program is the "writing down of principal and accumulated interest charges" of Farm Service Agency loans. 7 U.S.C. § 1991 (b)(3)(C); 7 C.F.R. § 1951.909(e)(4) [formerly 7 C.F.R. § 1951.909(e)(5)]. A borrower who qualifies for a write-down on a loan secured by real estate is required to enter into a shared appreciation agreement. *See* 7 C.F.R. § 1951.909(e)(4)(vi) [formerly 7 C.F.R. § 1951.909(e) (5)(iii)(D)].

B. Standard of Review

The Administrative Procedure Act, 5 U.S.C. §§ 701-706, sets forth the standards for judicial review of an agency's decision. Section 706(2) of Title 5 of the United States Code states, "The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law... (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute."

An agency's legal determinations will be affirmed as long as they are not arbitrary or capricious and are in accordance with the law. *See Sierra Resources Inc. v. Herman*, 213 F.3d 989,992 (7th Cir. 2000). The arbitrary and capricious standard is highly deferential: even if a reviewing court disagrees with an agency's action, the court must uphold the action if the agency considered all relevant factors and the court can discern a rational basis for the agency's choice. *See Camp v. Pitts*, 411 U.S. 138, 143 (1973); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402,415-16 (1971), *overruled on other grounds in Califano v. Sanders*, 430 U.S. 99 (1977). The agency's decision is not arbitrary or capricious as long as "'the agency's path may be reasonably discerned.'" *Mount Sinai Hospital Medical Center v. Shalala*, 196 F.3d 703,708 (7th Cir. 1999).

"The substantial evidence standard of the Administrative Procedures Act is generally used as the standard of review for an agency's factual findings." *Mount Sinai Hospital*, 196 F.3d at 709; *see also Sierra Resources*, 213 F.3d at 989. Under this deferential standard of review, the court reviews the entire record to see whether it contains *"'such* relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Aegerter v. City of Delafield, Wisconsin*, 174 F.3d 886, 889 (7th Cir. 1999) (quoting *Dilling Mechanical Contractors, Inc. v. NLRB*, 107 F.3d 521,524 (7th Cir. 1997)).

C. Review of Decision

Plaintiffs contend that defendant Farm Service Agency erred in determining that they owe $96,500 in shared appreciation because the plain language of the shared

appreciation agreement dictates that recapture of appreciation occurs only upon the happening of one of the following three contingencies during the agreement period: (1) cessation of farming; (2) transfer of the property; or (3) payment in full. (Plaintiffs are not challenging defendant's appraisal of their property as they did before the National Appeals Board.) Defendant responds that the agreement states that recapture occurs at the end of the ten-year period or earlier if any one of the three triggering events occurs and that plaintiffs had notice of the terms by way of the language of the shared appreciation agreement, 7 U.S.C. § 2001, 7 C.F.R. § 1951.914(b)(1999) and the notice sent to plaintiffs by the Farm Service Agency before they entered into the program.

The language of the agreement requires recovery of appreciation "between the date of this Agreement and *either* the expiration date of the Agreement *or* the date Borrower pays the loan in full, ceases farming or transfers title of the security." (Emphasis added.) Defendant points to the agreement's use of the disjunctive "or" between the alternative points at which the recapture payment can become payable as support for its position that the agreement allows for recovery of appreciation at the end of the agreement. Plaintiffs contend that the agreement does not provide a formula for recapture at the expiration date of the agreement and that the agreement specifies that the amount of recapture "will be based on the difference between the value of the security at the *time of disposal or cessation* by Borrower of farming and the value of the security at the time this Agreement is entered into." (Emphasis added). The director found that the language of the shared appreciation agreement was clear. I cannot find that this decision was not rational or that the director failed to consider the language of the

agreement and the parties' arguments as to its meaning in reaching his conclusion. Although the agreement could have been written more artfully, it conveyed the basic concept that borrowers had to give up a share of the appreciation of the loan collateral in return for the debt write-down and that this share would become due when the agreement expired or earlier if the agreement was terminated upon the happening of a specified event.

Defendant's position is supported strongly by the language of the relevant statute and accompanying regulations. Plaintiffs' loan was secured by a real estate mortgage, which states that the shared appreciation agreement is entered into pursuant to 7 U.S.C. § 2001. 7 U.S.C. § 2001(e)(4) states "Recapture shall take place at the end of the term of the agreement, or sooner - (A) on the conveyance of the real security property; (B) on the repayment of the loans; (C) if the borrower ceases farming operations." The agency's regulations state, "Shared appreciation is due at the end of the term of the Shared Appreciation Agreement, or sooner, if one of the following events occurs: (1) The sale or conveyance of any or all the real estate security...; (2) Repayment of the loans...; (3) The borrower or surviving spouse ceases farming operations or no longer receive farm income .... ; (4) The notes are accelerated." 7 C.F.R. § 1951.914(b)(1999). The director was correct in his determination that the hearing officer was entitled to rely on the relevant statutes and regulations in construing the language of the shared appreciation agreement. The quoted language demonstrates that the director did not err in concluding that appreciation is recoverable at the end of the ten-year term.

Plaintiffs contend that defendant has failed to show that they received the notice about the terms of the program before they signed the agreement. Regardless whether plaintiffs received such notice, the mortgage papers that were attached to the agreement referred specifically to 7 U.S.C. § 2001. Furthermore, plaintiffs received notice about the impending recapture of appreciation upon termination of the agreement in letters dated April 24, 1997, November 6, 1997 and October 5, 1998.

In support of their interpretation of the agreement, plaintiffs point to statements made to plaintiffs by two of defendant's employees before and after the agreement was signed that led them to believe that recapture would not occur unless they ceased farming or transferred title to the security. After hearing testimony from plaintiffs about what defendant's employees had told plaintiffs about the meaning of the recapture provision, the hearing officer and the director was obligated to consider such testimony and give it the weight they deemed appropriate. An examination of the decisions of the hearing officer and the director demonstrates that they were persuaded that the language of the agreement coupled with the language of the applicable regulations mandated recapture of appreciation upon the expiration of the term of the agreement. It is not the role of the court to reweigh the evidence that was presented to the agency; rather, "the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Overton Park*, 401 U.S. at 416. I cannot say that there was a dear error of judgment in the agency's interpretation of the shared appreciation agreement. In this regard, the reasoning in *In re Moncur*, No. 98-03213, slip op. at 9 (Bankr. D. Idaho May 27, 1999), is

persuasive. "Without question, the [Farm Service Agency's loan] program contemplated a recapture payment at the conclusion of the [shared appreciation agreement] term if payment in full of the write-down balance had not been made during the term of the [agreement]." *Id.*

Plaintiffs contend that the policy behind the loan program supports their interpretation that they do not owe defendant any shared appreciation, but their argument is not convincing. Plaintiffs argue that it is good policy to provide an incentive in the form of total loan forgiveness with no requirement of shared appreciation so that farmers will abide by the terms of the loan program and participate in it for at least ten years. The agency did not discuss policy implications in its decisions. It is not appropriate to speculate as to what role, if any, such implications played in the decision making process. However, it can be argued that although "the program allows the borrower to escape repayment of a portion of its debt, it recognizes that it would be unfair to also allow the borrower to retain the full benefit of the appreciation in the value of the farm during the repayment period. This is reasonable policy." *In re Moncur*, slip op. at 9. *See also Cerniglia v. Glickman*, 118 F. Supp. 2d 27, 32 (D.D.C. 2000) (quoting 7 U.S.C. § 2001(a)(1)) ("One need not parse any text to understand that the [Farm Service Agency's] loan servicing program seeks to help farmers in times of financial distress... Such assistance is not entirely altruistic. By giving up some of its returns, the government is able to minimize 'losses to the Secretary on such loans.'") It is not for this court to decide whether plaintiffs' policy view or defendant's is more prudent. After reviewing the administrative record, including the transcript of the evidentiary hearing, I cannot find that the director's decision

was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "unsupported by substantial evidence." 5 U.S.C. § 706(2)(A), (E).

C. Estoppel

Plaintiffs contend that defendant is estopped from collecting $96,500 in appreciation because plaintiffs relied to their detriment on statements made by defendant's officers that no recapture would be owed upon the expiration of the 10-year agreement. Plaintiffs point to the following evidence in support of their estoppel argument: (1) statements by loan officer Michael Drewiske to plaintiffs before they signed the agreement; (2) Drewiske's notes dated April 5, 1994, in which he indicated that he had told plaintiffs that the shared appreciation would come due if they paid off the loan early; and (3) a letter dated January 26, 1998 from loan officer Karolyn Corbett in which she calculated plaintiff's pay off amount but did not include any amount for shared appreciation.

Plaintiffs argue that defendant is not entitled to immunity from estoppel because it acted in a proprietary and not a sovereign capacity. Plaintiffs are mistaken. The government acts in a proprietary capacity when it undertakes activities "primarily for the commercial benefits of the government." *Rew Enterprises, Inc. v. Premier Bank*, N.A., 49 F.3d 163, 170 (5th Cir. 1995). In order to obtain a loan from the Farm Service Agency, borrowers must demonstrate that they are "unable to obtain sufficient credit elsewhere to finance their actual needs at reasonable rates and terms.., for loans for similar purposes and periods of times." 7 U.S.C. § 1922(a). *See Green v. United States*, 8 F. Supp. 2d 983,994 (W.D. Mich. 1998) (finding Farm Service Agency acted in

sovereign capacity in lending money). It cannot be said that the Farm Service Agency acts in a proprietary capacity in lending money to farmers in financial distress. *See id.* (stating "government acts in a sovereign rather than a proprietary role 'by providing grants for the purpose of realizing particular social goals'").

"Equitable estoppel is a doctrine which precludes one party from asserting a claim or defense against another party who has detrimentally altered her position in reliance on the former's misrepresentation or failure to disclose a material fact." *Kennedy v. United States*, 965 F.2d 413,417 (7th Cir. 1992). The burden of proof is on the party claiming estoppel. *Id.* In general, equitable estoppel will not lie against the government. *See Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947). In *Merrill*, a farmer applied for insurance under the Federal Crop Insurance Act to cover his wheat farming operations. An agent of the Federal Crop Insurance Corporation advised the farmer that his entire crop qualified for insurance and the farmer obtained insurance through the corporation. After the farmer's crop was lost, it was discovered that the agent's advice had been erroneous. The Supreme Court recognized the serious hardship caused by the agent's misinformation but rejected the argument that his representations estopped the government from denying insurance benefits, stating that "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Id.* at 384. In this case, Farm Service Agency loan officials did not have the authority to bind defendant to a certain position by misstating the terms of the shared appreciation agreement.

The Court of Appeals for the Seventh Circuit has stated that a private party may "assert equitable estoppel against the government in a very narrow category of cases - when the traditional elements of estoppel are shown and there is affirmative misconduct on the part of the government." *Kennedy*, 965 F.2d at 417; *LaBonte v. United States*, 233 F.3d 1049, 105 (7th Cir. 2000). Even if statements by loan officials could bind the government, plaintiffs have failed to demonstrate any affirmative misconduct on behalf of the government in misleading them as to the terms of the recapture provision. That Drewiske may have told plaintiffs that they would owe appreciation if they paid off the loan early does not demonstrate affirmative misconduct; rather, it is a correct but incomplete statement of the terms of the agreement. Corbett's letter of January 26 fails to demonstrate misconduct; rather, it was a response to a specific inquiry by plaintiff about their loan. Assuming loan officer Drewiske actually did assure plaintiffs that they were correct in their understanding that the government would not recapture any appreciation upon the expiration of the agreement, his misstatement fails to demonstrate affirmative misconduct. "Affirmative misconduct is 'more than mere negligence'" *LaBonte*, 233 F.3d at 1053 (internal citations omitted). At most, it appears that Drewiske misunderstood the terms of the agreement and conveyed his mistaken understanding to plaintiffs; plaintiffs do not argue that he tried to trick them or knew of his mistake. *See Green*, 8 F. Supp. 2d at 994 (holding that statements by Farm Service Agency employees "were based on an erroneous application of [Farm Service Agency] regulations, and constitute no more than mere negligence. Such statements do not rise to the level of affirmative misconduct required for an estoppel claim against the government."). As a result, defendant cannot be estopped

from collecting $96,500 from plaintiffs for the appreciated value of their property between 1989 and 1999.

ORDER

IT IS ORDERED that the decision of the Director of the National Appeals Division that plaintiffs Donald and Patsy Israel and Richard and Shirley Quinton owe $96,500 in shared appreciation pursuant to a shared appreciation agreement dated September 15, 1989 is AFFIRMED. Plaintiffs' complaint is DISMISSED.

Entered this 22nd day of March, 2001.

BY THE COURT:

/s/ _____
BARBARA B. CRABB
District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

No. 00-C-223-C

[Filed March 5, 2001]

Donald and Patsy Israel, husband and wife, Richard and Shirley Quinton, husband and wife, all d/b/a Israel and Quinton Farms,	)
Plaintiffs,	)
v.	)
United States Department of Agriculture,	)
Defendant.	)

JUDGMENT IN A CIVIL CASE

This action came for consideration before the court with U.S. DISTRICT JUDGE BARBARA B. CRABB presiding The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the decision of the Director of the National Appeals Division that plaintiffs Donald and Patsy Israel and Richard and Shirley Quinton owe $96,500 in shared appreciation pursuant to a shared appreciation agreement dated September 15, 1989 is AFFIRMED. Plaintiffs' complaint is DISMISSED and this case is CLOSED.

/s/ _____
Joseph W. Skupniewitz
Clerk of Court

Date: March 5, 2001

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

No. 00-C-223-C

[Filed April 11, 2000]

Donald and Patsy Israel, husband and wife, Richard and Shirley Quinton, husband and wife, all d/b/a Israel and Quinton Farms,	)
Plaintiffs,	)
v.	)
United States Department of Agriculture, and Farm Service Agency,	)
Defendants.	)

COMPLAINT

Plaintiffs DONALD and PATSY ISRAEL, RICHARD and SHIRLEY QUINTON, d.b.a. ISRAEL & QUINTON FARMS, as and for their Complaint herein, allege as Follows.

I. THE PARTIES

1. Plaintiffs Donald and Patsy Israel ("the Israels") are husband and wife, and reside at 2858 Oak Road, Shell Lake, Wisconsin 54871.

2. Plaintiffs Richard and Shirley Quinton ("the Quintons") are husband and wife, and reside at 2859 Oak Road, Shell Lake, Wisconsin 54871.

3. Since 1973, the Israels and Quintons have engaged in farming, doing business in partnership as "Israel and Quinton Farms." They jointly own and operate land at 2858-2859 Oak Road, Shell Lake, Wisconsin.

4. Defendant United States Department of Agriculture is an agency of the United States, located in Washington, D.C.

5. Defendant Farm Service Agency ("FSA") is an agency of the United States Department of Agriculture and the United States, and is located in Washington, D.C., with branch offices throughout the United States.

II. THE FSA DEBT WRITE-DOWN PROGRAM

6. In the late 1980's, the Farm Home Administration, now a part of FSA, discharged a considerable amount of farm debt, pursuant to the Agricultural Credit Act of 1987. A principal reason for this statutory debt write-down program was to provide relief to farmers in the wake of the farm crisis that occurred during the late 1980's.

7. As a condition of the write down of their debt, some farmers were required to sign Shared Appreciation Agreements. Most of these were ten year agreements tied to the real estate originally pledged as security for the debt.

III ISRAEL & QUINTON'S SHARED APPRECIATION AGREEMENT

A. The Negotiations Leading Up to the Agreement

8. In about 1988, Israel and Quinton decided to divide their land and cattle between them. Although this plan was not realized, efforts to implement it caused Israel & Quinton to incur additional cost.

9. On or about 1988, Israel & Quinton entered into negotiations with Farm Home Administration for a write down of their existing debt, which consisted of six notes, having an aggregate principal amount of approximately $200,000. The negotiations culminated in a Shared Appreciation Agreement dated September 15, 1989.

B. The Language of the Agreement

10. This Shared Appreciation Agreement, dated September 15, 1989, provided in relevant part as follows:

> As a condition to, and in consideration of FmHA writing down the above amounts and restructuring the loan, borrower agrees to pay FmHA an amount according to one of the following payment schedules:

Seventy five (75) percent of any positive appreciation in the market value of the property securing the loan as described in the above security instrument(s) between the date of the Agreement and either the expiration date of this Agreement or the date the borrower pays the loan in full, ceases farming or transfers title of the security, if such event occurs four (4) years from the date of this Agreement.

Fifty (50) percent of any positive appreciation in the market value of the property securing the loan above as described in the security instruments between the date of this Agreement and either the expiration date of the Agreement or the date Borrower pays the loan in full, ceases farming or transfers title of the security, if such event occurs after four years but before the expiration date of this Agreement.

The amount of recapture by FmHA will be based on the difference between the value of the security at the time of disposal or cessation by Borrower of Farming and the value of the security at the time this Agreement is entered into. If the borrower violates the terms of the agreement FmHA will liquidate after the borrower has been notified of the right to appeal.

11. Pursuant to this agreement, approximately $100,357.34 of Israel's & Quinton's existing debt was written down. At the time the agreement was entered into, Israel & Quinton's property was valued at $152,000.

B. Israel & Quinton's Understanding of the Agreement

12. At the time they signed the Shared Appreciation Agreement, Israel & Quinton understood its language to mean that FSA would seek no recapture of appreciation unless Israel & Quinton paid the loan in full, ceased farming operations, or transferred title of the security during the ten year write down period of the Shared Appreciation Agreement.

C. FSA's Representations Concerning the Shared Appreciation Agreement

13. FSA's own representations, both oral and written, entirely support Israel & Quinton's interpretation and understanding of the Shared Appreciation Agreement.

14. At the time the Shared Appreciation Agreement was signed, Mike Drewiske, FSA's Farm Loan officer in Spooner, Wisconsin, explained that no recapture would be sought unless Israel & Quinton paid the loan in full, ceased farming operations, or transferred title of the security during the ten year write down period.

15. Israel & Quinton relied upon Drewiske's representation in deciding to enter into the Shared Appreciation Agreement.

16. In a meeting on April 5, 1999, Israel & Quinton told Drewiske they had the opportunity to refinance their existing loan with FSA, at a favorable rate of interest. Drewiske, on behalf of FSA, told Israel & Quinton not to refinance because if they did, recapture would be triggered under the Shared Appreciation Agreement.

17. Relying upon FSA's representation, Israel & Quinton decided not to refinance their property. They did so based entirely upon FSA's representation that if they did so, recapture of appreciation would occur. In forgoing refinancing, Israel & Quinton did not obtain a more favorable rate of interest, and instead are now faced with FSA's claim for shared appreciation in the amount of $96,500. Therefore, Israel & Quinton relied upon FSA's representation to their detriment.

18. Subsequently, Karolyn Corbett, another FSA loan officer involved with the debt write-down program, also told Israel & Quinton they were reading the Shared Appreciation Agreement correctly, and that no recapture of appreciation would occur unless they ceased farming or transferred title of the security during the ten year term of the agreement.

19. In a letter to Israel & Quinton dated January 26, 1998, Ms. Corbett stated:

> When Donald and Richard were in our office to make your payment, you had some questions about your FSA loan account. The enclosed printout was obtained after your last payment was applied. Since we did a deferral

> action on your loan in 1998, the interest that was deferred has been paid in increments since that time. That deferred interest amount does not show up on the first page of the printout. I have high-lighted the figures that add up to your payoff figure (the figure circled in red).
>
> Therefore, your payoff consists of:
>
> | | |
> |---|---|
> | QUPR (principal) | 109574.90 |
> | QUIN (interest) | 586.91 |
> | CPIN (deferred interest) | 8748.45 |
> | TOTAL: | 118,910.26 |

No mention was made of recaptured appreciation or the like.

D. FSA's Explanatory Letters

20. Apparently concerned about the ambiguity of its own contract, FSA wrote Israel & Quinton on April 24, 1997, purporting to explain and clarify the language of the agreement:

> Essentially what this agreement says is that if the value of your real estate increases after the date of the write down, you will be responsible for repaying some or all of the debt FSA wrote down. If any repayment is due it will become due when any one of the following events happens: Ten years has passed. You pay the rescheduled loan in full. You ceased farming. You transferred title to the property.

> This notice is to remind you of your potential obligation to repay all or a portion of the debt that the Farm Service Agency (formerly FmHA) wrote down.
>
> It is important to note that regardless of what you do, the agreement is automatically triggered 10 years from the date your debt was written down. IF you believe your property has increased in value since your write down, you will need to consider this potential liability as you make your future plans

A second, virtually identical letter, was sent on October 5, 1998.

21. FSA's improper interpretation of its own Shared Appreciation Agreement has been exacerbated by the unilateral rigidity with which it has sought to enforce the agreement. In determining the amount of appreciation, FSA considers the appraisals of its own appraisers as well nigh conclusive, and will only accept alternative appraisals if they are within 5 percent of its own. In Israel & Quinton's case, this has resulted in a grossly exaggerated, and yet virtually unchallengeable-appreciation determination, which values their property at $345,000 as of May 20, 1999, an amount far in excess of comparable land values in Washburn County.

22. Based upon its own appraisal, FSA concluded that $96,500 in shared appreciation is due.

IV. PLAINTIFFS' ADMINISTRATIVE PROCEEDINGS

A. The Requests for Reconsideration

23. In a letter dated September 9, 1999, FSA denied plaintiffs' request for reconsideration; and affirmed its decision to require payment of $96,500 in shared appreciation.

B. Appeal Before the National Appeals Division

24. On October 7, 1999, plaintiffs filed a joint appeal before the National Appeals Division of the Department of Agriculture. Pursuant to that appeal request, a scheduling conference was set before David R. Benner on November 18, 1999 at 9:15 a.m.

25. At the scheduling conference held on November 18, 1999, plaintiffs asked that Michael Drewiske and Karolyn Corbett be subpoenaed to attend the hearing. Drewiske was the officer who originally negotiated the Shared Appreciation Agreements, and made statements to Israel and Quinton regarding the interpretation of the agreement. Ms. Corbett is an FSA official with particular knowledge as to the interpretation of the Agreement, and who also made statements to Israel and Quinton regarding their particular contract.

26. On December 2, 1999, plaintiff's requested that Russell S. Kiecker be subpoenaed to attend and testify at the hearing. Mr. Kiecker, who served as Israel & Quinton's County Agent during the relevant period, was asked to testify

concerning the land values in the area, and to render an opinion with regard to the appraisal that was performed on plaintiffs property for purposes of calculating the appreciation.

27. On December 8, 1999, Hearing Officer Benner denied all three of plaintiffs' subpoena requests.

28. Pursuant to 7 U.S.C. § 6997 (c), a hearing before FSA Hearing Officer David R. Benner was held on December 9, 1999.

29. On January 3, 2000, Hearing Officer Benner held that FSA's decision to demand $96,500 in Shared Appreciation from Israel & Quinton was not erroneous.

C. Director's Review

30. On or about February 4, 2000, plaintiffs requested a Director Review of FSA's determinations.

31. On March 17, 2000, a Final Director Review Determination was entered affirming FSA's determinations.

V. STATEMENT OF JURISDICTION AND VENUE

32. This court has jurisdiction over this matter pursuant to 28 U.S.C.A. 1346 (a), 5 U.S.C. § 6999;7 CFR §§ 11.12 and 11.13, and 5 U.S.C. §§ 701, *et seq.* Specifically, plaintiffs have exhausted all administrative remedies.

33. Venue is proper in this court pursuant to 28 U.S.C. § 1402, in that plaintiffs reside in this district.

FIRST CLAIM FOR RELIEF
(Judicial Review Pursuant to 5 U.S.C. 703, et. seq.)

34. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 33 of this Complaint as if set forth here in full.

35. The determinations of FSA in this matter, and the subsequent affirmance of those determinations by the National Appeals Division Director, were arbitrary, capricious, an abuse of discretion, and contrary to existing law.

36. FSA's determinations, and the subsequent affirmance of those determinations by the National Appeals Division Director, were not supported by substantial evidence.

SECOND CLAIM FOR RELIEF
(Declaratory Judgment)

37. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 36 of this Complaint as if set forth here in full.

38. A real and actual controversy exists between the parties concerning the meaning and interpretation of the Shared Appreciation Agreement.

39. FSA's interpretation of its own Shared Appreciation Agreements is arbitrary, capricious, an abuse of discretion, and not in accordance with existing law.

40. The determinations of the FSA are unsupported by substantial evidence in this case, which is subject to section 556 and 557 of the Administrative Procedure Act.

41. Under the plain language of the Shared Appreciation Agreement, FSA is entitled to no recapture of appreciation under the facts herein.

THIRD CLAIM FOR RELIEF
(Negligent Misrepresentation)

42. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 41 of this Complaint as if set forth here in full.

43. At all times relevant herein, FSA, its officers, agents, and representatives, had a duty to speak with due care regarding the interpretation and the meaning of the Shared Appreciation Agreement.

44. In breach of its duty to speak with due care concerning the interpretation and meaning of the Shared Appreciation Agreement, FSA, its officers, agents, and representatives, failed to speak with due care as to FSA's interpretation of the Shared Appreciation Agreement

45. Plaintiffs relied upon FSA's negligent representations to their determent. But for FSA's negligent misrepresentations, FSA would not have entered into the

Shared Appreciation Agreement.

46. As a direct and proximate result of FSA's breach of duty, plaintiffs have suffered damages.

FOURTH CLAIM FOR RELIEF
(Injunction)

47. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 46 of this Complaint as if set forth here in full.

48. Plaintiffs lack an adequate remedy at law.

49. Based upon the facts and equities herein, plaintiffs are entitled to an injunction enjoining FSA from seeking, in any forum, to recapture shared appreciation based upon its erroneous interpretation of the Shared Appreciation Agreement.

WHEREFORE, plaintiffs request judgment as follows:

A. On their First Claim for Relief, reversal of FSA's determinations that it is entitled, under the Shared Appreciation Agreement, to one half of the alleged appreciation that accrued during the life of the Agreement.

B. On their Second Claim for Relief, a judgment construing and interpreting the Shared Appreciation Agreement.

C. On their Third Claim for Relief, rescission and reformation of those provisions of the Shared Appreciation Agreement upon which FSA erroneously relies for recapture of appreciation;

D. On their Fourth Claim for Relief, an injunction prohibiting FSA from seeking recapture of appreciation pursuant to its erroneous interpretation of the Shared Appreciation Agreement.

E. Such other and further relief as this court deems just and proper.

ANDERSON & NORINE

/s/ _____

William L. Norine 1020681
Box 507
Grantsburg, Wisconsin 54840
715-463-5365

Dated: April 11, 2000

APPENDIX F

UNITED STATES DEPARTMENT OF AGRICULTURE
NATIONAL APPEALS DIVISION
OFFICE OF THE SECRETARY
WASHINGTON, DC 20250

Case No. 2000E000107

[DATED March 17, 2000]

DIRECTOR REVIEW DETERMINATION

In the matter of RICHARD & SHIRLEY QUINTON	)
	)
and	)
	)
FARM SERVICE AGENCY	)
	)

STATEMENT OF THE CASE

This is a review of a National Appeals Division (NAD) Hearing Officer determination issued on January 3, 2000, that upheld the Farm Service Agency (Agency) decision as to payment pursuant to a Shared Appreciation Agreement (SAA).

The Hearing Officer determined that the Agency's decision was not erroneous.

The Appellant, Richard Quinton, submitted a written request for review on. February 4, 2000.

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, or marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720-5964 (voice and TDD).

To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, Room 326-W, Whitten Building, 1400 Independence Avenue, S.W., Washington, D.C. 20250:9410 or call (202) 720-5964 (voice and TDD). USDA is an equal opportunity provider and employer.

Upon consideration of the case record (CR), including information in the request for review, the laws applicable to the matter at issue, and applicable regulations as defined at 7 U.S.C. §6998(c), the following determinations are made:

EVIDENCE

The Hearing Officer's decision is supported by substantial evidence as follows:

1. The Appellants received a $100,357.34 write-down of Agency debt and entered into a SAA on September 15, 1989. The SAA expired on September 14, 1999. [Findings of Fact

(FOF) 1 and 2.]

2. The market value of the Appellants' property was determined to be $152,000 at the time the SAA was executed. As of May 20, 1999, the property was determined to have a market value of $345,000: The property valuation was conducted by a Certified General Appraiser and was performed in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP). (FOF 2 and Hearing Officer Conclusion 2.)

3. The Agency considered the current market value of the Appellants' property ($345,000), the market value upon execution of the SAA ($152,000), and determined that the amount of recapture was 50 percent of the appreciated market value ($193,000) or $96,500. (FOF 2 and 3.)

4. The Appellants agreed to pay 50 percent of any positive appreciation in value of the property during the term of the SAA (September 15, 1989, to September 14, 1999). (FOF 1)

5. On September 9, 1999, the Agency affirmed its decision to require payment of $96,500 in appreciation under the terms of the SAA. (CR I, Tab 6.)

CONCLUSIONS

The Hearing Officer's determination is consistent with the laws and regulations of the Agency and with the generally applicable interpretations of such laws and regulations, as follows:

1. The controlling regulations are cited at 7 CFR Part 1951, Subpart S and 7 CFR Part 1922, Subpart E.

2. Regulations at 7 CFR § 1951.909 (j) provide that borrowers with loans secured by real estate having a portion of their loans written down must execute an SAA as a condition of the debt write down. Regulations at 7 CFR §1951.914 (b) and the SAA specify that the Agency can recapture a portion of the written-off debt by taking a share of any positive appreciation in the value of the real property. The Agency must collect 50 percent of any positive appreciation in the market value of the security between the date the SAA was executed and the date it expires. The amount of recapture shall be determined by obtaining an appraisal to establish the current market value of the property subject to recapture. The maximum appreciation recaptured will not be more than the total mount of debt write down.

The Appellants received a write down of Agency debt in the amount of $100,357.34 on September 15, 1989, and entered into an SAA. The Appellants agreed to pay 50 percent of any positive appreciation in value of the property during the term of the SAA (September 15, 1989, to September 14, 1999). The SAA expired on September 14, 1999; Notwithstanding the Appellants' arguments on review that the SAA is ambiguous and regulations are irrelevant, the terms of the SAA are clear and published regulations, by law, are a proper basis for the Hearing Officer's determination. The market value of the Appellants' property was determined to be $152,000 at the time the SAA was executed. Regulations at 7 CFR § 1922.201 provide that farm tracts will be appraised for market value determined by Agency appraisers

and will comply with USPAP. The current market value of the property was determined to be $345,000, as of May 20, 1999. The property was evaluated by a Certified General Appraiser and the appraisal was prepared in accordance with USPAP. The Agency considered the current market value of the Appellants' property ($345,000), the market value as of the initiation of the SAA ($152,000), and, determined that the amount of recapture was 50 percent of the appreciated market value ($193,000) or $96,500. Substantial evidence supports the Hearing Officer's determination that the Agency did not err in establishing the amount of the recapture due under the SAA and requiring payment of such.

3. The Hearing Officer conducted an evidentiary hearing in accordance with 7 U.S.C. §6997(c).

4. The statute at 7 U.S.C. §6997(c)(4) provides that the Appellant shall bear the burden of proving that the adverse decision of the agency was erroneous. The Appellants failed to prove by a preponderance of evidence that the Agency decision was erroneous.

DETERMINATION

1. The Hearing Officer's determination is upheld.

2. This concludes the administrative appeal of this case.

/s/ _____
NORMAN G. COOPER DATE: 3/17/00
Director

APPENDIX G

UNITED STATES DEPARTMENT OF AGRICULTURE NATIONAL APPEALS DIVISION

Case No. 2000E000107

[DATED January 3, 2000]

In the matter of RICHARD & SHIRLEY QUINTON	)
and	)
FARM SERVICE AGENCY	)

APPEAL DETERMINATION

An evidentiary hearing was held on December 9, 1999, in Eau Claire, Wisconsin pursuant to the provisions of Title 7, United States Code (7 USC) Sections 6991-7002, on an appeal of an adverse decision of the Farm Service Agency (Agency) to demand payment of shared appreciation after the expiration of their Shared Appreciation Agreement. The Hearing Officer, David R. Benner was assigned to conduct the hearing in accordance with the provisions of Title 7 of the Code of Federal Regulations (7 CFR) Section 11.8.

The Appellants, Richard & Shirley Quinton, bear the burden of proving by a preponderance of the evidence that the

adverse decision was erroneous. The Agency did not err in its decision.

STATEMENT OF THE CASE

The adverse decision at issue is the demand for payment of shared appreciation. The Agency determined the Appellants' Shared Appreciation Agreement (SAA) had expired and that $96,500 in shared appreciation was due. The Farm Service Agency issued its adverse decision on September 9, 1999.

During a prehearing teleconference conducted on November 18, 1999, the Appellants and Agency agreed to hold a combined hearing with the Appellants' partners and cosigners of the Shared Appreciation Agreement. The partners, Donald & Patsy Israel, had also appealed.

The Agency's adverse decision to demand payment of shared appreciation was based on the Shared Appreciation Agreement and an appraisal of the security property.

The Appellants argue that the SAA had expired and therefore no payment is due. They also argue that the Agency appraisal of their property is too high, therefore the Agency's decision was erroneous.

Based upon the case record (CR) and all applicable laws and regulations, the Hearing Officer makes the following findings of fact (FOF), conclusions and determination.

FINDINGS OF FACT

1. In consideration of a loan writedown, Richard & Shirley Quinton and Donal & Patsy Israel signed a Shared Appreciation Agreement (SAA) with the Agency on September 15, 1989. The SAA was a ten year agreement and expired on September 14; 1999. The SAA provided that, "Borrower agrees to pay fifty (50) percent of any positive appreciation the market value of the property securing the loan above as described in the security instruments between the date of this Agreement and either the expiration date of this Agreement or the date Borrower pays the loan in full, ceases farming or transfers title of the security, if such event occurs after four (4) years but before the expiration date of this agreement." *(CR Tab I pages 25, 26)*

2. At the time of the signing of the SAA, the security property was valued at $152,000. In May 1999 the Agency had Thomas A. Olson, a Certified General Appraiser appraise the security property. Using USPAP standards, Mr. Olson valued the property at $345,000. Thus the property appreciated $193,000 ($345,000 - $152,000). The Appellants and their partners had received a $100.357.34 writedown of the loans. *(CR Tab 1 pages 26, 35-36)*

3. On June 30, 1999, the Agency notified the Appellants and their partners of the shared appreciation calculations and requested $96,500 by September 14, 1999. (CR *Tab I page 1 C)*

APPLICABLE LAWS AND REGULATIONS

The applicable regulations are found in Title 7 of the Code of Federal Regulations Part 1951 and 7 CFR Part 1922. Specifically the regulations regarding Shared Appreciation Agreements are found in 7 CFR Part 1951.914 and regulations regarding appraisals are found in 7 CFR 1922.201.

CONCLUSIONS

1. Title 7 of the Code of Federal Regulations (7 CFR) Part 1951.914 (b) directs when shared appreciation is due. It states that shared appreciation is due at the end of the term of the Shared Appreciation Agreement.

The Appellants' Shared Appreciation Agreement (SAA) expired on September 14, 1999. (FOF 1) Therefore the Agency decision to calculate shared appreciation due is correct according to regulations.

The Appellants argue that the agreement "expired" on September 14, 1999, meaning that no shared appreciation is due. They also argue that they were told that this was the case at the time of signature. However, the agreement and the regulation clearly state that shared appreciation is due at the expiration of the agreement. (FOF 1)

2. 7 CFR Part 1951.914 (c) provides for determining the amount of shared appreciation due.

(1) The current market value of the real estate property will be determined based on a current appraisal.

(2) Share appreciation will be due if there is a positive difference between the market value of the security property at the time of calculation and the market value of the security property as of the date of the SAA. The maximum appreciation requested will not be more than the total amount written down. The amount of shared appreciation will be:

(ii) 50% of any positive appreciation if the term of the SAA expires.

7 CFR Part 1922.201 provides for appraisals of farms. It provides that farm tracts will be appraised for market value. Agency appraisers will comply with the guidelines and standards as set out in Section I and II of the Uniform Standards of Professional Appraisal Practice (USPAP):

The Appellants received a $100,357.34 writedown of their Agency loans in 1989. At that time the security property was valued at $152,000. The Agency had Thomas A. Olson, a State Certified General Appraiser, conduct an appraisal of the farm. Using USPAP standards, he found the market value of the farm to be $345,000 as of May 20, 1999. This established the appreciation over the ten year SAA at $193,000. (FOF 2)

According to regulations, 50% of the appreciation is due from the Appellants up to the amount of the writedown. 50% of $193,000 is $96,500 which is less than the $100,357.34 writedown. (FOF 2) Therefore the Agency is correct in requesting $96,500 from the Appellants and their partners according to regulations.

DETERMINATION

The Agency's decision to demand $96,500 in shared appreciation from the Appellants was not erroneous.

FURTHER

7 CFR 11.9 sets forth the fight to and the procedures for a Director review of the Hearing Officer determinations and they are as follows:

1. 7 CFR 11.9 (a) (1) Not later than 30 days after the date on which an appellant receives the determination of a Hearing Officer under § 11.8, the appellant must submit a written request, signed personally by the named appellant, to the Director to review the determination in order to be entitled to such review by the Director. Such request shall include specific reasons why the appellant believes the determination is wrong.

7 CFR 11.9 (a)(2) Not later than 15 business days after the date on which an agency receives the determination ora Hearing Officer, the head of the agency may make a written request that the Director review the determination. Such request shall include specific reason why the agency believes the determination is wrong, including citations of statutes or regulations that the agency believes the determination violates. Any such request may be made by the head of an agency only, or by a person acting in such capacity, but not by any subordinate officer of such agency.

7 CFR 11.9 (a)(3) A copy of a request for Director review submitted under this paragraph shall be provided simultaneously by the submitted to each party to the appeal.

7 CFR 11.9 (b) The Director promptly shall notify all parties of receipt of a request for review.

7 CFR 11.9 (c)...parties to an appeal may submit written responses to a request for Director review within five (5) business days from the date of receipt of a copy of the request for review.

2. The Appellant and the Agency may obtain a copy of the audio tapes made of the hearing proceeding at no cost. The Appellant and/or the Agency may obtain the copies by requesting them in writing from the Regional Assistant Director at the address below:

Regional Assistant Director, Eastern Region
National Appeals Division
8909 Purdue Road, Suite 240
Indianapolis, IN 46268

3. This is an administratively final determination unless a timely request for review is filed pursuant to 7 CFR 11.9 and the attached "Request for Director Review."

/s/_____

David R. Benner
Hearing Officer
National Appeals Division
Attachment: "Request for Director Review"

Dated this January 3, 2000

APPENDIX H

UNITED STATES DEPARTMENT OF AGRICULTURE
NATIONAL APPEALS DIVISION

Case Nos. 2000E00069, 2000E000107

[DATED December 18, 1999]

In the matter of Donald & Patsy Israel	)
RICHARD & SHIRLEY QUINTON	)
	)
and	)
	)
FARM SERVICE AGENCY	)
	)

NOTICE OF DENIAL OF SUBPOENA REQUEST

The Appellants requested an appeal of Farm Service Agency's (FSA) adverse decision regarding their Shared Appreciation Agreement. A hearing is scheduled for December 9, 1999, in Eau Claire, Wisconsin.

By letters dated December 1 & 2, 1999, the Appellants requested the issuance of a subpoena for the production of witnesses by the Agency as follows:

> -Two FSA employees who have made statements to the Appellants regarding Shared

Appreciation Agreements.

-One former County Agent with an opinion on the appraisal.

The following determinations have been made:

1. The National Appeals Division Rules of Procedures at Title 7 of the Code of Federal Regulations (7 CFR) Part 11.8 (a) (2) (iii) (B) states that "For a subpoena of a witness, the appellant or the agency has established that either a representative of the Department or a private individual possesses information that is pertinent and necessary for disclosure of all relevant facts which could impact the final determination, that the information cannot be obtained except through the testimony of the person, and that the testimony cannot be obtained absent issuance of a subpoena."

The Appellants have not established that all relevant facts related to the Shared Appreciation Agreement cannot be disclosed by the witnesses who plan on attending the appeal hearing. The Appellants may testify as to their understanding of the Shared Appreciation Agreement they signed. Furthermore, the Appellants have not established that the former County Agency cannot attend without a subpoena or that his testimony is necessary for disclosure of all relevant facts.

2. The subpoena request is denied.

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, or marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720-2600 (voice and TDD).

Dated and mailed this 8th day of December, 1999.

/s/ _____
DAVID R. BENNER
Hearing Officer
National Appeals Division

Copies of "Notice of Denial of Subpoena Request" sent postage paid to:

Appellants,

Donald & Patsy Israel
2858 Oak Road
Shell Lake, WI 54871

Richard & Shirley Quinton
2839 Oak Road
Shell Lake, WI 54871

Appellants' Representative,

William L. Norine
116 East Madison Avenue
Box 507
Grantsburg, WI 54840

Agency Representative,

David C. Borman
USDA, FSA
Courthouse, 330 E. LaSalle Avenue
Barton, WI 54812

NAD Eastern Regional Assistant Director, Indianapolis, IN.
Agency State Appeals Coordinator, Madison, WI

APPENDIX I

EXCERPT FROM BRIEF

[Dated December 1, 1999]

***

At the time the Shared Appreciation Agreement was signed, Mike Drewiske, FSA's Farm Loan officer in Spooner, Wisconsin, explained that no recapture would be made unless Israel & Quinton paid the loan in full, ceased farming operations, or transferred title of the security during the ten year write down period. This understanding was corroborated by subsequent discussions with Karolyn Corbett, another FSA loan official, who also told Israel & Quinton that the agreement was to be so interpreted and understood. Indeed, in a letter dated January 26, 1998, Ms. Corbett stated:

> When Donald and Richard were in our office to make your payment, you had some questions about your FSA loan account. The enclosed printout was obtained after your last payment was applied. Since we did a deferral action on your loan in 1998, the interest that was deferred has been paid in increments since that time. That deferred interest amount does not show up on the first page of the printout. I have high-lighted the figures that add up to your payoff, figure (the figure circled in red).

Excerpt from Brief - 12/1/99

Therefore, your payoff consists of:

QUPR (principal)	109574.90
QUIN (interest)	586.91
CPIN (deferred interest)	8748.45
TOTAL:	118,910.26

No mention was made of recaptured appreciation or the like.

The Shared Appreciation Agreement itself provides:

As a condition to, and in consideration of FmHA writing down the above amounts and restructuring the loan, Borrower agrees to pay FmHA an amount according to one of the following payment schedules:

1. Seventy five percent of any positive appreciation in the market value of the....

...or obligation between them, with the intent to cancel the former and to substitute the new one therefor." (Quoting C.J.S. Novation, p. 689, sec. 9). In this case it is plain beyond doubt that the Shared Appreciation Agreement completely and permanently replaces the original notes. That agreement explicitly reduces the amount of those debts in numerical terms, and provides specific and discrete contingencies pursuant to which the appreciation would be recaptured. Nowhere is reinstituting the notes themselves contemplated.

***

***

...the termination date of the agreement? There is none. And FSA cannot Simply take advantage of its own ambiguous contract, to the detriment of Israel & Quinton. In fact those parties were told all along the agreement would be construed the way they understood it, and the only way in which the agreement makes any sense.

THE PAROL EVIDENCE IN THIS CASE SUPPORTS ISRAEL & QUINTON'S INTERPRETATION OF THE SHARED APPRECIATION AGREEMENT

When a contract is ambiguous, parol evidence is admissible as a means of arriving at the intent of the parties. Such evidence is also admissible where fraud, misrepresentation, or duress is present. In this case, all the negotiations leading up to the Shared Appreciation Agreement, as well as conversations afterwards, led Israel & Quinton to believe that no recapture would occur unless, during the term of the Agreement, they ceased farming, or transferred title to the security. Relying upon these negotiations, they entered into the Agreement. In particular, Mr. Drewiske, the loan officer with whom Israel & Quinton originally negotiated, orally confirmed Israel & Quinton's understanding and interpretation of the Agreement. Drewiske's interpretation was subsequently confirmed by another FSA loan official, Karolyn Corbett, who stated as early as last week that it was always her understanding--and that of other loan officers in the FSA--that recapture would only occur if the party ceased farming or transferred title to the property during the term of the agreement. How much appreciation would be recaptured depends upon when that

event occurs, there being no provision for calculating the amount if the mere expiration date of the agreement is a triggering event.

***

APPENDIX J

UNITED STATES DEPARTMENT OF AGRICULTURE

[Dated January 26, 1998]

LETTER TO DONALD AND PATSY ISRAEL FROM KARILYN CORBETT

January 26, 1998

Israel and Quinton Farms
Donald and Patsy Israel
2858 Oak Road
Shell Lake, WI 54871

Dear Mr. and Mrs. Israel:

When Donald and Richard were in our office to make your payment, you had some questions about your FSA loan account.

The enclosed printout was obtained after your last payment was applied. Since we did a deferral action on your loan in 1989, the interest that was deferred has been paid in increments since that time.

That deferred interest amount does not show up on the first page of the printout. I have high-lighted the figures that add up to your payoff figure (the figure circled in red).

Therefore, your payoff consists of:

QUPR (principal) =	$109,574.90
QUIN (interest) =	586.91
CPIN (deferred interest) =	8,748.45
TOTAL	$118,910.26

Feel free to contact our office if you have further questions about this.

Sincerely,

/s/ _____
KARILYN CORBETT
Ag Credit Officer

FOLD OUT EXHIBIT

FSA LOAN ACCOUNT STATEMENTS

ACCOUNT INFORMATION

TERM NBR 848 OPR ID 848 STDT 011498 ACDT 01
CNUM 58-007-0396235499 NAME ISRAEL & QUINTON CSDT 0000 ZS
FCOD 4320 LNUM 09 KCOD 51 DUED 00 FMCD 0 FLAG DEF3 SF
DEFL 091589 DEXD 091590 DECL 091590 DFLA 11,825.33 DFCA 3,076.88 FPCI
DSED 000000 DSXD 000000 DSCD 000000 LSAA .00 DSLO .00
DOLN 091589 AMED 000000 APDT DCCA FYLN 18 ICRC INR1 8.
ZDLP 122297 ZDLR 123097 RGT2 1 LRDT 041697 RGT1 02 CCCD 0 PAYC 0 INR2 8.

XAON	139,121.57	XAOA		RCCT	.00	EPMT	
PTC1	29,546.67	PTC3		QPCR	29,546.67	CICR	
ICRT	76,080.45	INCR		QICR	76,080.45	QNIC	
SSTS	13,588.00A	SSC3		QSST	13,588.00A	MICE	ICCD
UNPN	109,574.90	UNPA		QUPR	109,574.90	YICE	NUMO
UNIN	586.91	UNIA		QUIN	586.91	YNIC	QDEL
DACN	25.5174	DACA		QDIN	25.5174	MOIN	
UPAM		UPUN		FC10	74,766.11	QMTI	
UIAM		UIUN		FCIN		QTMI	
STAM		ZADI		ZAAI		ZEDI	RI
XAIC		PTC2		CYIC		AVIR	
XANI	13,588.00	ZDNI 010198 JTOI 2		STIN		PNSR	
STAN		STAA		QSTA		ICDF	
TPOF	118,910.26	ZSST		QMDU	13,588.00	ICGR	
						CNCI	
						ACDT:	

CASE NUMBER: 58 007 0396235499 STATUS TYPE: AI LOAN: 09

BEST AVAILABLE COPY

TERM NBR 848 OPR ID 848 ACCOUNT INFORMATION

FCOD 4320	LNUM 09	NBRR	TPCH	DPCD 7	ZDOO		CSAC	CPIC	JTF
NOLN 01	LNOA 07	LLCN	UACD 0	JTAN 0	XAOO			ICIC	SPC
VCOD 0	RCOD 1	TACD 000	ETBC 0	BCOD	CVAC			RRAS	FSV
MARS 0	SEXC 0	PRLN 00	MRAC	TDCD	UAMT			CRFC	XAI
OTDC 0	MDFY 0	MDDN 000	SSC2 4	CLWC	XAOV			HDWC	MCC
XALN	.00	ZDLN 000000		QNCA	FAGL			GPER	PCC
BICS		UBIP			AAFI		ICIN		SUI
INSS		INXT			DF1Y		TX1Y		PPI
PRSS		PNXT			DF2Y		TX2Y		RPI
DLNQ		TYEX	ACST		OFEE		LRDA		LRC
SAI1		YSI1	UCST		UFEE		VCNO		YAI
SAI2		YSI2	DCST		ODTE		RVDT		NP/
INRO		DTEO			DPLA	.00		DNLA	
UPIS		PAMC 0	INVN		DNII	.00		DNCA	
UIIS		SISA	DTIS		DFII	423.00		NCLA	
NAF1 FARMS			ZIPC 54871						
NAF2 2858 OAK RD.			NONF 2		NCII	.00		NCCA	
NAF3 SHELL LAKE, WI			NOAF 2		CPIN	8,748.45		NCIN	
NAF4			CPPD 000000		CDFM			DADM	
								CNCI	

CASE NUMBER: 58 007 0396235499 STATUS TYPE: AI LOAN: 09 ACDT:

00000153

APPENDIX K

FOLD OUT EXHIBIT

HANDWRITTEN NOTES

D F A

(Hard of hearing Speak Loud) Richard Quinton 468-2736

Israel & Quinton — Don Israel 468-2562

3/21/94 phone Called Don Israel left message on answer
on covering 3/18/94 R/R. Called Richard Quinton
explained 3/18/94 R/R. Reminded them that we needed a
complete application by 4-11-94.

3/22/94 phone Spoke with Don Israel he will develop a
on Farm + Home Plans for he & his wife as if the partnership
were dissolved ~~already~~. Base the Farm + Home Plan off the
Partnership. Also I requested that they provide FmHA with the
seperate legal descriptions if they dissolve the partnership. After we
receive the seperate legal descriptions we will then order
2 seperate appraisals plus an appraisal of the entire Real Estate
in Partnership.

4/6/94 office Richard Quinton & Don Israel to C/O. They thought they
on might be able to get a loan from a Bank to refinance
FmHA loan. Indicated that at such a time as they pay me in
full the shared appreciation agreement releases. The unpaid
loan balance is ~$158,704 Appraised Value 3/23/93 $198,000
+23,000
92% = $181,704 FmHA MKT Value at time of shared 152,000
of Mkt Value 198,000 appreciation agreement $23,000 = 46,000 X 50%
& indicated that general Banks will only loans 50-60% of Market
Value & encouraged them to submit an application for 515. The
final due date for submitting an application is 4-11-94.

4-11-94 ISRAEL & QUINTON IN OFFICE - DO NOT
HAVE A COMPLETE APPLICATION. SAID
THEY WILL BRING ACCOUNT CURRENT
BY 5/1/94

4-18-94 office FH D Of Account not current by 5-1-94
on Mail NA send Certified Att 9A + 10A send one -
Acct # to Israel [redacted] and one to Quinton A
Paid
Date

00000150

APPENDIX L

STATUTORY PROVISIONS

5 U.S.C. §§ 556:

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.
(b) There shall preside at the taking of evidence--
(1) the agency;
(2) one or more members of the body which comprises the agency; or
(3) one or more administrative law judges appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.
(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may--
(1) administer oaths and affirmations;
(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;
(4) take depositions or have depositions taken when the ends of justice would be served;
(5) regulate the course of the hearing;
(6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;
(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;
(8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;
(9) dispose of procedural requests or similar matters;
(10) make or recommend decisions in accordance with section 557 of this title; and
(11) take other action authorized by agency rule consistent with this subchapter.
(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit

rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.
(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

5 U.S.C. §§ 701:

(a) This chapter applies, according to the provisions thereof, except to the extent that--
(1) statutes preclude judicial review; or
(2) agency action is committed to agency discretion by law.
(b) For the purpose of this chapter--
(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--
(A) the Congress;
(B) the courts of the United States;
(C) the governments of the territories or possessions of the United States;
(D) the government of the District of Columbia;
(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
(F) courts martial and military commissions;
(G) military authority exercised in the field in time of war or

in occupied territory; or
(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and
(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.